



(22,808)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 732.

CHARLES E. MYERS AND A. CLAUDE KALMEY,  
PLAINTIFFS IN ERROR,

vs.

ROBERT BROWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
DISTRICT OF MARYLAND.

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1 UNITED STATES OF AMERICA,  
*District of Maryland, to wit:*

At a Circuit Court of the United States in and for the Maryland District, Begun and Held at the City of Baltimore, on the First Monday in November (Being the Seventh Day of the Same Month), in the Year of Our Lord One Thousand Nine Hundred and Ten.

Present:

The Honorable Thomas J. Morris, Judge Maryland District.  
John C. Rose, Judge Maryland District.  
John Philip Hill, Esq., Attorney.  
George W. Padgett, Esq., Marshal.  
Arthur L. Spamer, Clerk.

Among others were the following proceedings, to wit:

At Law.

ROBERT BROWN  
vs.  
CHARLES E. MYERS and A. CLAUDE KALMEY.

2 *Declaration.*

Filed July 30, 1909.

In the Circuit Court of the United States for the District of Maryland.

ROBERT BROWN  
vs.  
CHARLES E. MYERS and A. CLAUDE KALMEY.

*Declaration.*

Robert Brown, by J. Wirt Randall, Edgar H. Gans, Edwin G. Baetjer and Charles J. Bonaparte, his attorneys, sues Charles E. Myers and A. Claude Kalmey, in this his suit of a civil nature at Common Law, where the matter in dispute exceeds, exclusive of interest and costs the sum or value of two thousand dollars and arising under the constitution and laws of the United States.

For that, on April 8th, 1908, there was approved by the Governor of Maryland an Act of Assembly of such tenor and effect as is shown by the printed reproduction thereof, published by authority of the said State in the volume professing to contain the Laws of Maryland for the year 1908, commencing on page 347 of the said printed volume under the heading "Chapter 525—An Act to fix the qualifications of voters at municipal elections in the city of Annapolis and to provide for the registration of said voters", and which is prayed

to be taken as part of this declaration; and likewise as appears by a true copy of the Act of Assembly aforesaid, hereunto annexed marked "Plaintiff's Exhibit Act" and which is prayed to be taken and considered as a part of this declaration with the same effect as herein set forth in words and figures at length; and, as appears by the said legally authorized printed reproduction and likewise by the exhibit above mentioned, the fourth section of the Act of Assembly above mentioned was, and is in the words and figures following,

3 ing, that is to say:

"SEC. 4. Said registers of voters shall at said registration register all male citizens of the said city of Annapolis applying for registration of twenty one years of age or over, who have resided therein one year preceding any municipal election, who have never been convicted of any infamous crime under the laws of the State of Maryland, and who shall come within any one of the three following classes of male citizens. 1. All tax-payers of the City of Annapolis assessed on the city books for at least five hundred dollars. 2. And duly naturalized citizens. 2½. And male children of naturalized citizens who have reached the age of 21 years. 3. All citizens who, prior to January 1st, 1868, were entitled to vote in the State of Maryland or any other State of the United States at a State election and the lawful male descendants of any person who prior to January 1st, 1868, was entitled to vote in this State or in any other State of the United States at a State election, and no person not coming within one of the three enumerated classes shall be registered as a legal voter of the City of Annapolis or qualified to vote at the municipal election held therein and any person so duly registered shall, while so registered, be qualified to vote at any municipal election held in the said city; said registration shall in all other respects conform to the laws of the State of Maryland, relating to and providing for registration in the State of Maryland."

Of which said section so much as is contained in the following passage, namely:

"And who shall come within any one of the three following classes of male citizens. 1. All taxpayers of the City of Annapolis assessed on the city books for at least five hundred dollars. 2. And duly naturalized citizens. 2½. And male children of naturalized citizens who have reached the age of 21 years. 3. All citizens who, prior to

4 January 1st, 1868, were entitled to vote in the State of Maryland or any other State of the United States at a State election, and the lawful male descendants of any person who, prior to January 1st, 1868, was entitled to vote in this State or in any other State of the United States at a State election and no person not coming within one of the three enumerated classes shall be registered as a legal voter of the City of Annapolis or qualified to vote at the municipal election held therein."

was and is contrary to and forbidden by the Constitution of the United States and Laws of the United States enacted in pursuance thereof; and more especially to the 15th Amendment to the Constitution of the United States and to do so much of the Act of Congress, approved May 31st, 1870, and printed in full by authority of the

United States in 16 Statutes at Large 140, and likewise constituting section 2004 of the United States revised statutes, as is in the words and figures following, that is to say:

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding"

in so far as the said portion of the said section of the said Act of Assembly of the said State of Maryland affects or professes or attempts to affect the right to vote of any citizen of the United States by reason of his race, color, or previous condition of servitude, or the race, color or previous condition of servitude of any of his ancestors prior to the first day of January, in the year one thousand, eight hundred and sixty-eight; and being thus, as aforesaid, contrary to and forbidden by the supreme law of the land, the same was and is, wholly invalid and of no effect in law, as affecting the rights of any such citizen under and by virtue of section 2 of Article VI, of the Constitution of the United States.

And the plaintiff further says that he is a citizen of the United States, born in the State of Maryland on June 1st, 1848, and was at the time of his birth a slave, belonging to one, Mordecai Plummer, a resident and citizen of the said State.

And the said plaintiff further says that prior to and on the first day of January, in the year one thousand, eight hundred and sixty-eight, his, the said plaintiff's father, was a male citizen of the United States of the age of twenty-one years and upwards and a resident and citizen of the State of Maryland and that he, the said plaintiff's father would have been, prior to and on the day and year lastly aforesaid, entitled to vote at any election held in the county of his residence, in the State of Maryland, but for the word "white" in the first sentence of Section 1 of Article I of the Constitution of Maryland, then in force, which word was subsequently in legal effect expunged by the adoption of the 15th Amendment to the Constitution of the United States.

And the plaintiff further says that his said father, and likewise he, the said plaintiff, then and there both were and always had been and continued to be, and the plaintiff is now, of the negro race and black color, and by reason of the said race and color of the plaintiff's said father, then by reason of no other matter or thing whatsoever, he, the plaintiff's said father, was, prior to and on the first day of January, one thousand, eight hundred and sixty-eight, excluded from the elective franchise in the State of Maryland.

And the plaintiff further says that he has always been, as had been his said father, a reputable and law abiding resident of the State of Maryland, and neither was at any time guilty of any infamous crime or other act disqualifying him from exercising the elective franchise in the said State.

6 And the plaintiff further says that upon and immediately after the adoption of the 15th Amendment to the Constitution of the United States, he, the said plaintiff, having been a resident of the City of Annapolis since the year 1866, was duly registered as a legal voter in Anne Arundel County, and as such and in accordance with the provisions of Article II of the Code of Public Local Laws of the State of Maryland, title "Anne Arundel County" as then in force and from time to time thereafter amended and re-enacted, he became and was and has continuously been and is now entitled to vote at municipal elections of the City of Annapolis, and his rights as such legal voter were recognized by all officers of election and registration of the State of Maryland and of the said City of Annapolis for a period of more than thirty-eight years. And in accordance with the said Article of the said Code of Public Local Laws, he became and was and has continuously been and is now, as a citizen of the City of Annapolis entitled to vote for members of the General Assembly of Maryland, likewise entitled to vote at all such municipal elections, and has duly exercised his said rights for more than thirty-eight years.

And the plaintiff further says that the defendants herein are two of the three registers appointed, together with one Clarence M. Jones, for the Third Ward of the City of Annapolis in accordance with the provisions of Section 1 of the Act of the Assembly of the State of Maryland first above mentioned.

And, as such, in accordance with their official obligations and in compliance with their oath to support the Constitution of the United States, it became and was their evident duty to altogether disregard so much of the 4th section of the Act of Assembly above mentioned as abridges or restricts or professes or attempts to abridge or restrict the right of suffrage of the plaintiff or of any citizen of the United States by reason of race, color or previous condition of servitude.

And the plaintiff well hoped that the defendants would faithfully and conscientiously discharge their said duty and fulfill their  
7 obligation aforesaid, and, in such hope and confidence, on the seventh day of June last, at Annapolis in the State of Maryland aforesaid, the same being one of the days mentioned in Section 3 of the Act of Assembly first above mentioned, he, the said plaintiff applied to the said defendants and the said Clarence M. Jones, as such registers as aforesaid, then and there sitting as such registers aforesaid in accordance with the Act of Assembly aforesaid, for registration as a legal voter of the City of Annapolis in accordance with the provisions of the said Act, and demanded that he be so registered.

Yet the said defendants, wholly regardless of their said duty and obligation and of the plaintiff's rights in the premises, notwithstanding the protest of the said plaintiff, and the vote to the contrary of the said Clarence M. Jones, as such registers as aforesaid, declined and refused to permit the said plaintiff to be so registered as such legal voter as aforesaid; and thus restricted and abridged the plaintiff's right of suffrage which he had enjoyed for more than thirty eight years, avowedly and only because the said plaintiff's above

mentioned father, by reason of his race and color, and for no other reason whatsoever, was not entitled to vote in the State of his residence, to wit, the State of Maryland, prior to the first day of January, one thousand, eight hundred and sixty-eight; and their said refusal to so register the said plaintiff was caused and occasioned by no other matter or thing whatsoever.

Whereby, to wit, by such wrongful, illegal and oppressive refusal and declination on the part of the said defendants as such registers as aforesaid, to place the name of the plaintiff on the registration list of voters entitled to vote at municipal elections, in the City of Annapolis, the plaintiff has been and is, under color of an alleged statute of a State, to wit, of the said Act of the Assembly of the said State of Maryland, subjected and caused to be subjected to the deprivation of a right, privilege and immunity secured to him, the said plaintiff, by the Constitution and Laws, namely of the privileges and immunity to have his right to vote at elections as entitled  
8 *as entitled* as such citizens in a city, a municipality and a territorial sub-division of a State, to wit, of the State of Maryland, permitted and allowed without distinction or discrimination against him by reason of race or color on his part.

And the Plaintiff has been thereby deprived of the right to vote at an election held in the said City of Annapolis on the twelfth day of July in the year *in the year* one thousand nine hundred and nine and of the right to vote at all future elections in the said City and is subjected to an unjust stigma and aspersion on his character and status as a citizen, and his feelings have been greatly wounded, and he is subject to humiliation and obloquy and brought into public scandal, infamy and disgrace, and the plaintiff claims five thousand dollars damages.

J. WIRT RANDALL,  
EDGAR H. GANS,  
EDWIN G. BAETJER,  
CHARLES J. BONAPARTE,  
*Attorneys for Plaintiff.*

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# PLAINTIFF'S EXHIBIT ACT.

## "Chapter 525.

An Act to Fix the Qualifications of Voters at Municipal Elections in the City of Annapolis and to Provide for the Registration of said Voters.

SECTION 1. Be it enacted by the General Assembly of Maryland, That the Supervisors of Elections for Anne Arundel County be and they are hereby authorized and directed, during the month of May, in the year nineteen hundred and nine, and in the same month every two years thereafter, to appoint three registers for the city of Annapolis for each ward of said city, one from each of the two leading political parties of the State; said registers of voters shall receive the same compensation as registers of voters under the general laws

of the State, and shall hold office for the term of two years until their successors are duly appointed and qualified. Said registers shall take the usual oath of office before the Supervisors of Elections.

SEC. 2. And be it enacted, That said Supervisors of Elections shall procure and deliver to the registers of voters for each of the said wards two registration books similar in all respects to registration books now in use under the election laws of Maryland, and all necessary blanks and stationery for conducting and having a complete registration of the voters of said city.

SEC. 3. And be it enacted, That said registers for each of said wards shall open said registration books at the usual polling places in each of the wards of said city in the first and second Mondays and Tuesdays of June in the year nineteen hundred and nine for a complete registration of the voters of said city who possess the qualifications required by this Act, and every two years thereafter, on the first Monday in May, said registers of voters shall open said books at the usual polling places in said wards for the revision of said lists of registration and for the registration of new voters possessing the qualifications presented by this Act. Said registers of voters shall give at least ten days' notice of the time and place of said registration, to be published in the newspapers doing the city printing and by hand bills posted around the city.

SEC. 4. Said registers of voters shall at said registration register all male citizens of the said city of Annapolis applying for registration of twenty-one years of age or over, who have resided therein one year preceding any municipal election, who have never been convicted of any infamous crime under the laws of the State of Maryland, and who shall come within any one of three following classes of male citizens. 1. All taxpayers of the city of Annapolis assessed on the city books for at least five hundred dollars. 2. And duly naturalized citizens. 2½. And male children of naturalized citizens who have reached the age of 21 years. 3. All citizens who, prior to January 1, 1868, were entitled to vote in the State of Maryland or any other State of the United States at a State election, and the lawful male descendants of any person, who, prior to January 1, 1868, was entitled to vote in this State or in any other State of the United States at a State election, and no person not coming within one of the three enumerated classes shall be registered as a legal voter of the city of Annapolis or qualified to vote at the municipal elections held in said city; said registration shall in all other respects conform to the laws of the State of Maryland relating to and providing for registration in the State of Maryland.

SEC. 5. Said books of registration shall at the close of each registration be turned over to the Supervisors of Elections for safe keeping and shall be delivered to the Judges of municipal elections in the city of Annapolis for the purpose of holding municipal elections therein, and shall be the only books of registration for municipal elections in said city.

SEC. 6. The cost of said registration shall be paid by the city of Annapolis.

11 SEC. 7. Any register of voters under the provisions of this Act who shall knowingly violate the provisions of this Act shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in the general laws of this State relating to registration.

SEC. 8. And be it enacted, That this Act shall take effect from the date of its passage.

Approved April 8, 1908."

12 *Summons.*

Issued July 30, 1909.

THE UNITED STATES OF AMERICA,  
*District of Maryland, To-wit:*

The President of the United States of America to the Marshal for the Maryland District, Greeting:

We command you that you summon Charles E. Myers and A. Claude Kalmey if they be found in your district, to appear before the Judges of the Circuit Court of the United States of America for the Fourth Circuit in and for the District of Maryland, at the United States Court Room in the City of Baltimore, on the 1st Monday of September next, to answer unto the action of Robert Brown and how you shall execute this precept you make known to us in our Circuit Court for the District aforesaid, and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 30th day of July, in the year of our Lord one thousand nine hundred and nine.

Issued the 30th day of July, 1909.

[SEAL OF COURT.]

ARTHUR L. SPAMER, *Clerk.*

*Marshal's Return Endorsed on Above Summons.*

"Summoned Charles E. Myers and A. Claude Kalmey, both personally, at Annapolis, Maryland, July 31, 1909.

JOHN F. LANGHAMMER,  
*U. S. Marshal."*

13 *Appearance for Defendants.*

Filed August 31, 1909.

In the Circuit Court of the United States for the District of Maryland.  
No. 39, Civil "E" Dkt.

ROBERT BROWN

versus

CHARLES E. MYERS and A. CLAUDE KALMEY.

Mr. CLERK: Enter my appearance as attorney for the defendants in the above entitled case.

RIDGELY P. MELVIN.

14     *Petition of Plaintiff and Order of Court Thereon Directing  
Defendants to Plead Within Certain Time.*

Filed November 13, 1909.

In the Circuit Court of the United States for the District of Maryland.

39, Civil E.

ROBERT BROWN

vs.

CHARLES E. MYERS and A. CLAUDE KALMEY.

Petition.

To the Honorable the Judge of said Court:

The Petition of Robert Brown, Plaintiff in the above entitled cause, respectfully shows:

That on July 30, 1909, he brought his suit in this Court against the above mentioned Defendants, and filed a declaration therein of such tenor and effect as is shown by the original thereof, now remaining of record in this Honorable Court, and whereunto your Petitioner humbly prays reference;

That the Defendants in the said suit were duly summoned and appearance entered for them by Ridgely P. Melvin, their attorney, but they have filed no plea in said cause;

That your Petitioner has recently ascertained the facts to be that owing to some inadvertence, no copy of his declaration aforesaid was furnished at the time of the institution of the suit to be served upon the said Defendants by the Marshal, and that, by reason of this omission, the said Defendants have not been under a rule plea.

He therefore humbly prays that this Honorable Court may forthwith lay a rule upon the said Defendants, requiring them to plead to his declaration aforesaid within such time and upon such conditions as may seem to your Honor meet and just, and that he

15     may have such other and further relief in the premises as the exigency of his case may require.

And as in duty &c.

J. WIRT RANDALL,  
EDGAR H. GANS,  
EDWIN G. BAETJER,  
CHARLES J. BONAPARTE,  
*Attorneys for Plaintiff.*

*Order and Rule.*

Upon the foregoing petition it is ordered and ruled by the Court this 13th day of November, 1909, that the Defendants in the above entitled cause plead to the declaration therein filed within 20 days

after duly attested copies of the said declaration, the above petition and this order and rule shall have been served upon them or their attorney of record.

THOS. J. MORRIS, *Judge.*

The foregoing petition endorsed.

Service of the within Petition & Order of Court and a copy of Declaration is hereby admitted on behalf of the Defendants this 19th day of November, 1909, at Annapolis, Maryland.

RIDGELY P. MELVIN, *Attorney.*

*Marshal's Return Endorsed on Above Petition.*

Served copy of the within Petition & Order of Court and a copy of Declaration on Ridgely P. Melvin, Attorney for Charles E. Myers and A. Claude Kalmey, at Annapolis, Maryland, November 19, 1909.

JOHN F. LANGHAMMER,  
*U. S. Marshal."*

16

*Demurrer.*

Filed December 9, 1909.

In the Circuit Court of the United States for the District of Maryland.

ROBERT BROWN

vs.

CHARLES E. MYERS and A. CLAUDE KALMEY.

*Demurrer.*

The defendants, Charles E. Myers and A. Claude Kalmey demur to the declaration of the plaintiff in the above case, and for grounds of demurrer say:

1. That said declaration is insufficient in law and bad in substance.

2. That said declaration fails to show any ground of jurisdiction in this Honorable Court over or in respect to the parties, matters and things set forth therein.

3. That by the laws under which they, the defendants, were appointed and acting, the defendants were charged with and exercising in respect to the transactions, matters and things complained of and set forth in said declaration, duties, functions and powers of a judicial nature; that in the discharge and exercise of said duties, functions and powers, they, the defendants, were not and cannot be held legally responsible for anything more than an honest and faithful exercise of their judgment; and that said declaration fails to allege

that the defendants or either of them, did, or failed to do, any act to the prejudice or injury of the plaintiff, either wilfully, maliciously, fraudulently or corruptly, so as to render them or either of them legally liable to the plaintiff in the premises.

17 4. Because the declaration charges on its face that the Act of the General Assembly of Maryland, 1908, chapter 525, under which, as the declaration further avers, the defendants were appointed and acting, was and is illegal, unconstitutional and void; and the declaration fails to show that the defendants were authorized to register or charged with any duty of registering the plaintiff at the time he presented himself for registration, as set forth in said declaration, under any other statute or law; that, therefore, upon the averments and charges of the declaration, the defendants had no authority and were charged with no duty to register the plaintiff when he presented himself to be registered, as set forth in the declaration, and, accordingly, are not legally liable to the plaintiff in the premises.

5. Because the defendants are not subject or liable to any action for damages for refusing to register the plaintiff under said Act of 1908, Chapter 525, which, as charged and shown by the said declaration, forbade the defendants to register the plaintiff when he presented himself for registration, as set forth in said declaration, and which said Act, as appears from its context, imposed criminal penalties upon the defendants for any violation of its terms and provision.

6. And for other reasons and grounds to be assigned at the hearing.

7. That the allegations contained in the declaration in this case do not show a case where the State of Maryland, or any person acting under its authority, has denied or abridged the right of the plaintiffs to vote on account of race, color or previous condition of servitude.

8. That the inhibitions contained in the Fifteenth Amendment against the denial or abridgment of the right of the citizens of the United States to vote on account of race, color or previous condition of servitude is by plain language of the amendment made to apply only to the right to vote which citizens of the United States have

18 by virtue of such citizenship; that is, the right to vote derived from the United States, and that the inhibition therein contained does not apply to or in any way affect the right to vote conferred by the state upon any of its citizens.

9. That allowing the broadest possible construction, the right of citizens of the United States to vote mentioned in the Fifteenth Amendment, which the states are thereby prohibited from denying or abridging on account of race, color or previous condition of servitude, is a right to vote at elections of a public general character and does not include the right to vote in corporate bodies created solely by legislative will and wherein such right to vote is dependent upon legislative discretion as municipal corporations.

10. That if construed to have reference to the right to vote at state or municipal elections, the Fifteenth Amendment would be beyond the amending power conferred upon three-fourths of the states by Article V of the Constitution, and therefore the amendment

should not receive that construction, if it is fairly open to a more limited construction.

Wherefore the defendants pray judgment, etc.

ISAAC LOBE STRAUS,  
RIDGELY P. MELVIN,  
WILLIAM L. MARBURY,  
*Attorneys for Defendants.*

19

*Opinion of the Court.*

Filed October 28, 1910.

In the Circuit Court of the United States for the District of Maryland.

At Law.

JOHN B. ANDERSON

v.

CHARLES E. MYERS and A. CLAUDE KALMEY.

WILLIAM H. HOWARD

v.

CHARLES E. MYERS and A. CLAUDE KALMEY.

ROBERT BROWN

v.

CHARLES E. MYERS and A. CLAUDE KALMEY.

MORRIS, *District Judge:*

Demurrers to the Plaintiffs' Declarations.

20 The questions of law which are now before this Court for its ruling have been raised by the defendants' demurrers to the declarations filed in three actions at law.

They are suits for damages against the defendants, Myers and Kalmey, who were two of the registers upon whom, together with a third register, one Clarence M. Jones, was imposed the duty of registering the qualified voters at a Special Registration held in the City of Annapolis in the month of June, 1909.

By the votes of the two registers who are defendants, the plaintiffs were denied registration; and in consequence, their votes were refused by the Judges of Election for the reason that they were not entitled to vote because their names did not appear among the registered voters of the City of Annapolis.

The Plaintiffs allege that they are natives of Maryland and lifelong residents therein who have been registered as voters since they were respectively 21 years of age, and had been continuously since registered voters in Maryland. They allege that in obedience to the law of Maryland enacted at the January session, 1908, Chapter 525, they were denied registration by the defendants, although in other

respect- they were legally qualified, solely because they were negroes and were discriminated against solely on that account. That the defendants as registers denied the plaintiffs registration against the protest of the third register wrongfully, illegally and oppressively and thus prevented the plaintiffs from voting at subsequent elections in the City of Annapolis.

The declarations allege that the action of said defendants as registers was in accordance with the said Act of the Legislature of Maryland, Chapter 525 of the Acts of 1908, providing for the qualification of voters in municipal elections in the City of Annapolis, and providing for the registration of said voters. By said Act of 1908, the registers were directed to register (1) all male citizens of Annapolis of 21 years or over who had resided therein over one year, 21 who had never been convicted of any infamous crime, and who were taxpayers assessed on the City tax books at least \$500.; (2) all duly naturalized citizens; (3) all male children of naturalized citizens of 21 years of age; (4) all citizens who, prior to January 1, 1868, were entitled to vote in the State of Maryland or any other State of the United States at a State election; (5) and all lawful male descendants of any person who, prior to January 1, 1868, was entitled to vote in Maryland or in any other State of the United States at a State election. And enacted that no person not coming within one of the enumerated classes should be registered as a legal voter of the City of Annapolis or be qualified to vote at any municipal election held in said city.

The several declarations then allege that so much of said Act of Maryland as refuses registration and consequently the right to vote at municipal elections in the City of Annapolis to all persons or their descendants who were not entitled to vote in Maryland prior to January 1, 1868, is contrary to the constitution and laws of the United States and more especially to the 15th Amendment to the Constitution and to the Act of Congress approved May 31, 1870, constituting Section 2004 of the United States Revised Statutes, in so far as the said clause of said law of Maryland of 1898 affects or professes or attempts to affect the right to vote of any citizen of the United States by reason of the race, color or previous condition of servitude of himself or any ancestors of his.

The plaintiff Anderson alleges that he is a citizen of the United States, born in Anne Arundel County, Maryland, in 1834. That prior to January 1, 1868, he would have been entitled to vote at any election in Anne Arundel County but for the word "white" in the Constitution of Maryland then in force, restricting the right to vote to "white" citizens by which restriction, being of the negro race and black color and by reason of no other cause whatsoever, he was, prior to January 1st, 1868, excluded from voting at municipal elections in the City of Annapolis.

22 The plaintiffs, Howard and Brown, allege substantially that their father and grandfather respectively would have been entitled to vote in Maryland except for the word "white" in the Maryland Constitution which was in force prior to January 1, 1868.

That they have heretofore voted at municipal elections and were denied registration by the defendants acting as registers by reason of the provisions of the Maryland law of 1908 solely and avowedly on account of their race and color; that is to say, because in the case of Anderson, he could not on account of his race and color have voted prior to January 1, 1868; and in the cases of Howard and Brown, because their father and grandfather respectively could not on account of race and color have so voted.

The plaintiffs all allege that in all other respects except their race and color, the plaintiffs met all the requirements of the law entitling them to registration.

To these declarations, the defendants have interposed a demurrer on the following ground:

1. That said declaration is insufficient in law and bad in substance.

2. That said declaration fails to show any ground of jurisdiction in this Honorable Court over or in respect to the parties, matters and things set forth therein.

3. That by the laws under which they, the defendants, were appointed and acting, the defendants were charged with and exercising in respect to the transactions, matters and things complained of and set forth in said declaration, duties, functions and powers of a judicial nature; that in the discharge and exercise of said duties, functions and powers, they, the defendants, were not and cannot be held legally responsible for anything more than an honest and faithful exercise of their judgment; and that said declaration fails to allege that the defendants or either of them, did or failed to do any act to the prejudice or injury of the plaintiff, either wilfully, maliciously, fraudulently or corruptly, so as to render them or either of them legally liable to the plaintiff in the premises.

4. Because the declaration charges on its face that the Act of the General Assembly of Maryland, 1908, chapter 525, under which, as the declaration further avers, the defendants were appointed and acting, was and is illegal, unconstitutional and void; and the declaration fails to show that the defendants were authorized to register or charged with any duty of registering the plaintiff at the time he presented himself for registration, as set forth in said declaration, under any other statute of law; that, therefore, upon the averments and charges of the declaration, the defendants had no authority and were charged with no duty to register the plaintiff when he presented himself to be registered, as set forth in the declaration, and accordingly, are not legally liable to the plaintiff in the premises.

5. Because the defendants are not subject or liable to any action for damages for refusing to register the plaintiff under said Act of 1908, Chapter 525, which, as charged and shown by the said declaration, forbade the defendants to register the plaintiff when he presented himself for registration, as set forth in said declaration, and which said Act, as appears from its context, imposed criminal penalties upon the defendants for any violation of its terms and provision.

6. And for other reasons and grounds to be assigned at the hearing.

The demurrers having been set for hearing, the Court has had the benefit of a very full oral presentation of the law by the able and distinguished counsel who have appeared for the plaintiffs and defendants, and they have also assisted the Court by learned  
24      briefs.

1. The first proposition urged by the defendants is that the declarations are insufficient in law because they do not allege that the defendants acted wilfully or maliciously in refusing registration to the plaintiffs.

It is true that in refusing registration to the plaintiffs, the registers were acting in their official capacity and that by the law of Maryland under which they were acting, they were required to refuse registration to the Plaintiffs. But, in my judgment, there are two considerations which affect this defense.

If the provision of the State law under which they acted in refusing registration is a void provision, it affords them no protection; *Ex-Parte Siebold*, 100 U. S., 371-376; and if by a valid law of the United States, a right of action is given to the plaintiffs as a remedy for denial of registration, then their right of action is based upon such valid law and is referable to it and is governed by its terms.

The consideration of the question whether or not the provisions of the Maryland law under and by virtue of which the plaintiffs were denied registration and, in consequence, denied the right to vote, is a valid provision, lies at the foundation of these suits and must of necessity be dealt with at the threshold.

By the 15th Amendment to the Constitution of the United States proclaimed March 30, 1870, the following provisions became part of the Constitution of the United States and became the supreme law of the land:

"SEC. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

"SEC. 2. The Congress shall have power to enforce this Article by appropriate legislation."

25      Congress exercised the power thus given it by enacting the statute approved May 31, 1870, which is now Section 2004 of the Revised Statutes, which reads as follows:

"SEC. 2004. All citizens of the United States who are otherwise qualified by law to vote at any election by the people of any State, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections without distinction of race, color or previous condition of servitude; any constitution, law, custom, usage or regulation of any State or territory or by or under its authority to the contrary notwithstanding."

And Congress by an Act approved April 20, 1871, now Section 1979 of the Revised Statutes, further enacted:

"SEC. 1979. Every person who under color of any statute, ordinance, regulation, custom or usage of any State or territory, subjects or causes to be subjected any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any

rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

And also enacted Clause 16 of Section 629 of the Revised Statutes giving to the Circuit Courts of the United States original jurisdiction as follows:

"Sixteenth. Of all suits authorized by law to be brought by any person to redress the deprivation under color of any law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or of any right secured by any law providing for equal rights of citizens of the United States or of all persons within the jurisdiction of the United States."

Prior to January 1, 1868, by the Constitution of Maryland, only "white" male citizens of the United States having the required length of residence were entitled to vote, and therefore, by the letter of the Maryland law, prior to January 1, 1868, the plaintiff Anderson being a black man was not entitled to vote; and Howard and Brown, not being descended from persons who, being white, were entitled to vote were likewise not entitled to vote; and the defendants

upon that ground solely denied to the plaintiffs registration.

26 Upon this state of facts and of the supreme law of the land, have not the defendants, contrary to that law, discriminated against the plaintiffs in the denying to them the right to vote because of their race, and color; and have not the statutes enacted for that purpose given them a right of action?

It is true that the words "race" and "color" are not used in the statute of Maryland; but the meaning of the law is as plain as if the very words had been made use of; and it is the meaning, intention and effect of the law, and not its phraseology, which is important. No other possible meaning for this provision has been suggested except the discrimination which by it is plainly indicated.

This being so, what is the effect of the 15th Amendment? It is declared by the Supreme Court to have the effect of obliterating from the statutes so much of their provisions as creates the forbidden discrimination.

Neal v. Delaware, 103 U. S., 370.

In the case of United States vs. Reese, 92 U. S., 214, Chief Justice Waite said (pp. 217-218):

The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this particular to one citizen of the United States over another on account of race, color or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race &c., as it was on account of age, property or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against the discrimination; now there is. It follows that the amendment has invested the

citizen of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. This under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation.'"

In *Ex-Parte Yarborough*, 110 U. S., 651, Mr. Justice Miller, speaking for the Court, said (p. 664):

27 "The Fifteenth Amendment of the Constitution, by its limitation of the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States."

And again:

"While it is quite true, as was said by this Court in *United States vs. Reese*, 92 U. S., 214, that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that, under some circumstances, it may operate as the immediate source of a right to vote. In all cases where the former slave-holding States had not removed from their Constitution the words "white man" as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, it annulled the discriminating word 'white,' and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people."

*Neale vs. Delaware*, 103 U. S., 370.

"In such cases the Fifteenth article of amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right."

That the 15th Amendment has *proprio vigore* the effect of eliminating the qualifying adjective "white" from all State constitutions and laws in fixing the qualifications of voters has been fully recognized by the Court of Appeals of Maryland in numerous cases.

*Schaeffer v. Gilbert*, 73 Md., 66.

*Southerland v. Norris*, 74 Md., 326.

*Hanna v. Young*, 84 Md., 179.

*Pope v. Williams*, 98 Md., 59.

28 It is therefore apparent that in enforcing the discriminating provisions of the State statute, the registers were doing and intended to do an act forbidden by the supreme law of the land and for doing which the State statutes could afford them no protection.

It is suggested in argument that if the Clause in question of the Maryland statute is, by the 15th Amendment, rendered invalid, the whole statute falls with it and the Registers had no power to register

anyone under it. This was held in *Giles v. Harris*, 189 U. S., 475, where the complainant alleged that the whole registration scheme of the Alabama constitution was a fraud on the Constitution of the United States and void, and asked the Court in an Equity suit to so declare; at the same time, asking the Court to decree that the Complainant be registered. The Court held that if the complainant's contention was sustained and the whole scheme declared void, there was no warrant of law for registering him at all.

The plaintiffs make no such allegation or contention in this case. The law is recognized as valid in all its provisions except the one which discriminates; and the plaintiffs allege that but for that discriminating clause, they would have been entitled to register.

We are now to consider whether it was a requisite of good pleading that the declaration should allege that the defendants acted wilfully, maliciously, fraudulently or corruptly in order to render them legally liable in these suits which are brought to enforce the statutory remedy given by Section 2004 and Section 1979.

It is to be observed that there can be no right of action under the 15th Amendment and these Sections of the Revised Statutes unless the discrimination and denial was in pursuance of a State law.

Therefore, if the defendants' contention could be upheld, the defendant in such a suit could always plead that he did not act maliciously or wilfully or in bad faith, because he was acting in obedience to the laws of the State.

The purpose of Congress in these Sections is distinctly stated to be to give a right of action and an effective safeguard against deprivation of a right by the enforcing of a statute of the State; and when

it says (Section 1979) that "every person who, under color of any statute of any State, subjects or causes to be subjected any citizen of the United States to deprivation of any right, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law", what can it mean but that the enforcement of the State law is of itself the wrong which gives rise to the cause of action? How could it be made to appear that the officer appointed to enforce a State law *acted* was guilty of malice in doing what the State law commanded him?

The common sense of the situation would seem to be that the law forbidding the deprivation or abridgment of the right to vote on account of race or color being the supreme law, any State law commanding such deprivation or abridgment is nugatory and not to be obeyed by any one; and any one who does enforce it does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit, and no allegation of malice need be alleged or proved.

There are restrictions of the right of voting which might in fact, operate to exclude all colored men, which would not be open to the objection of discriminating on account of race or color. As for instance, it is supposable that a property qualification might, in fact, result, in some localities, in all colored men being excluded; and the same might be the result, in some localities, from an educational test; and it could not be said although that was the result

intended, that it was a discrimination on account of race or color; but would be referable to a different test. But looking at the constitution and laws of Maryland prior to January 1, 1868, how can it be said, with any show of reason, that any but white men could vote then—and how can the Court close its eyes to the obvious fact that — is reason solely that the test is inserted in the Maryland Act of 1908, and is not the Court to take notice of the fact that during all the forty years since the adoption of the 15th Amendment, colored men have been allowed to register and vote in Maryland until the enactment of the Maryland Statute of 1908?

30 It was primarily the right of suffrage which was to be protected as against any restrictive legislation of the States which was the subject matter dealt with by the 15th Amendment and the Revised Statutes; and considering the purpose of the law, it does not seem that any other construction can be defensible.

United States v. Reese, 92 U. S., 214-218.

It is urged by the defendants that the inhibitions of the 15th Amendment against the denial of the right to vote of citizens of the United States on account of race or color must be held to apply only to the right to vote at Congressional elections derived from the United States and does not apply to the right to vote at State or municipal elections given by the State.

The 15th Amendment was proclaimed March 30, 1870, and by the Act of May 31st, 1870, Congress undertook to exercise the powers it understood were granted it by the Amendment and passed the Act, now Section 2004, providing expressly that all citizens of the United States otherwise qualified should be entitled and allowed to vote at all elections in any State, territory, county, city, without distinction of race or color, any constitution, law, custom, usage or regulation of any State or territory to the contrary, notwithstanding.

Nothing in the way of interpretation by the legislative body which itself had framed the amendment could be more significant than this enactment passed by Congress immediately upon its adoption. I do not find in the cases cited from the Supreme Court anything opposed to that interpretation. It seems clear that when, by the 15th Amendment, it is declared that the right of citizens of the United States to vote shall not be denied or abridged by any State on account of race or color, it means what Congress understood it to mean, namely, the right to vote at all public elections.

It is further urged by the defendants that if the 15th Amendment be construed as forbidding discrimination at State municipal  
31 elections, it is beyond the power of the States to so amend it; and therefore it should not receive that construction.

I do not appreciate the force of this contention.

That the Amendment declaring all persons born in the United States to be citizens of the United States and of the State wherein they reside, without discrimination on account of race or color, is beyond the amending power is not suggested; and if so, it cannot be reasonably maintained that to declare that such citizens shall not be deprived of the privilege of suffrage because of race or color, is beyond the amending power. One follows from the other.

It is my judgment that each of the declarations states a case in which the right of action is validly given by the constitution and laws of the United States and that the demurrers should be overruled.

32                    *Order of Court Overruling Demurrer.*

Filed November 14, 1910.

In the Circuit Court of the United States for the District of Maryland.

ROBERT BROWN

VS.

CHARLES E. MYERS and A. CLAUDE KALMEY.

In the above entitled cause it is ordered this 14th day of November, A. D. 1910, that the Demurrer of the Defendants to the Plaintiff's Declaration be, and the same is, hereby over-ruled; and that the defendants have leave to plead to the Declaration, if they shall be so advised, on or before the first day of December next; and also that a copy of this order be served on them or their counsel of record on or before the 20th day of November next.

THOS. J. MORRIS, *Judge.*

33                    *Plea.*

Filed November 23, 1910.

In the Circuit Court of the United States for the District of Maryland.

ROBERT BROWN

VS.

CHARLES E. MYERS and CLAUDE KALMEY.

And the defendants, Charles E. Myers and Claude Kalmey, by their attorneys, William L. Marbury, Isaac Lobe Straus, Ridgely P. Melvin and William L. Rawls, for plea to the declaration filed in the above-entitled case, say,—

That they did not commit the wrongs alleged.

RIDGELY P. MELVIN,  
WM. L. RAWLS,  
ISAAC LOBE STRAUS,  
W. L. MARBURY,

*Attorneys for Defendants.*

34

*Waiver of Jury Trial.*

Filed February 3, 1911.

In the Circuit Court of the United States in and for the District of Maryland.

BROWN  
vs.  
MYERS & KALMEY.

*Stipulation.*

It is agreed between the plaintiff and defendants in this case that the same shall be tried by the Court without a jury, and a jury trial is hereby expressly waived.

W. L. RAWLS,  
W. L. MARBURY,  
RIDGELY P. MELVIN,  
*Att'ys for Defendants.*  
EDGAR H. GANS,  
E. G. BAETJER,  
CHARLES J. BONAPARTE,  
J. WIRT RANDALL,  
*Att'ys for Pl't'ff.*

35 Whereupon and in pursuance of the agreement of counsel the issues joined as aforesaid between the parties aforesaid were tried before the court without a jury, and the court after hearing the evidence produced on behalf of the plaintiff and the defendants and considering the same, and the prayers offered on behalf of the plaintiff and defendants and having made certain rulings thereon doth say that the said defendants are guilty of the premises in manner and form as the said plaintiff hath above complained against him, and doth assess the damages of him the said plaintiff by occasion of the premises to the sum of \$250.00.

And thereupon the court directed a verdict to be entered for the plaintiff for the sum of \$250.00 and the same was entered accordingly.

Therefore it is considered by the court here that the said plaintiff recover against the said defendants as well the said sum of \$250.00 for his damages as the sum of \$37.80 adjudged by the court here unto the said plaintiff for his costs and charges by him about his suit in this behalf expended; and the said defendant in mercy and that the said plaintiff have hereof his execution, etc.

MEMO.—Verdict was rendered in the above entitled cause on the 3rd day of February, 1911, and judgment entered on said verdict on the 6th day of February, 1911.

36      *Order of Court Extending Time for Signing and Sealing the  
Bills of Exception.*

**Filed March 1, 1911.**

**In the Circuit Court of the United States for the District of Maryland.**

ROBERT BROWN

vs.

CHARLES E. MYERS and A. CLAUDE KALMEY.

Ordered by the Court this 1st day of March, 1911, upon application of the defendants that the time for preparing, signing and sealing the Bills of Exceptions in the above entitled cause, be and the same is hereby extended until and including the 1st day of April, 1911.

THOS. J. MORRIS, *Judge.*

The Plaintiff consents to the above order.

CHARLES J. BONAPARTE, *Att'y.*

37      *Order of Court Extending Time for Signing and Sealing  
                 Bills of Exception.*

Filed March 30, 1911.

In the Circuit Court of the United States for the District of Maryland.

ROBERT BROWN

**Y.**

CHARLES E. MYERS and A. CLAUDE KALMEY.

Upon application of the defendants in the above case, it is ordered by the Court this 30th day of March, 1911, that the time for preparing, signing and sealing the bills of exception in the above-entitled case be and the same is hereby extended until and including the 15th day of April, 1911.

THOS. J. MORRIS, *Judge.*

38      *Order of Court Extending Time for Signing and Sealing  
Bills of Exception.*

Filed April 12, 1911.

In the Circuit Court of the United States for the District of Maryland.

ROBERT BROWN

vs.

CHARLES E. MYERS and A. CLAUDE KALMEY.

Upon application of the defendants in the above entitled cause, it is ordered by the Court this 12th day of April, 1911, that the time

for preparing, signing and sealing the bills of exception in the above entitled cause, be and the same is hereby extended until and including the first day of May, 1911.

THOS. J. MORRIS, *Judge.*

39      *Order of Court Extending Time for Signing and Sealing  
Bills of Exception.*

Filed April 29, 1911.

**In the Circuit Court of the United States for the District of Maryland.**

ROBERT BROWN

**V.**

CHARLES E. MYERS and A. CLAUDE KALMEY.

Upon application by the defendants in the above entitled cause it is ordered by the Court this 29th day of April, 1911, that the time for preparing, signing and sealing the bills of exception in the above entitled cause be and the same is hereby extended until and including the 15th day of May, 1911.

THOS. J. MORRIS, *Judge.*

40 *Bill of Exceptions.*

Filed May 11, 1911.

In the Circuit Court of the United States for the District of Maryland.

ROBERT BROWN

**VS.**

CHARLES E. MYERS and A. CLAUDE KALMEY.

### Defendants' First Bill of Exceptions.

At the trial of the above entitled cause, the plaintiff, to sustain the issues on his behalf joined, offered evidence as follows, to wit:

ROBERT BROWN, colored, the plaintiff, being duly sworn, according to law, testified as follows:

**Direct examination:**

That he is Robert Brown the plaintiff in this cause, and is a citizen of the United States, born in the State of Maryland on June 1st, 1848, and was at the time of his birth a slave, belonging to one Mordecai Plummer, a resident and citizen of the said State. That prior to and on the first day of January, in the year 1868, his, the said plaintiff's father, was a male citizen of the United States of the age of 21 years and upwards, and that he, the said plaintiff's father,

would have been, prior to and on the date last mentioned, entitled to vote at any election, held in the County of his residence in the State of Maryland, had it not been for the word "white" in the Maryland Constitution.

41 The witness is, as was witness' father of the negro race, and that witness has always been, as was his father, a reputable and law abiding resident of the State of Maryland, and neither has ever been at any time convicted of any infamous crime, or other act, to disqualify either of them from exercising the elective franchise in the said State of Maryland. That upon and immediately after the adoption of the 15th Amendment to the Constitution of the United States, the witness, having been a resident of the City of Annapolis since the year 1866, was registered as a voter in Anne Arundel County, and as such continuously voted at municipal elections in the City of Annapolis down to the time of the passage of the Act of the General Assembly of 1908, Chapter 525.

The witness has also for the period of 38 years voted for the members of the General Assembly of Maryland. That on the 8th day of June, 1909, at Annapolis, Maryland, which day was one of the days of registration, under the Act of 1908, Chapter 525, the witness applied to the two defendants and Clarence M. Jones, who were the officers of registration for the third ward of the City of Annapolis, to be registered as a voter. That witness at the time of his application for registration on the 8th day of June, 1909, filed with the officers of registration the following paper, which was signed by witness and was offered and received in evidence:

ANNAPOLIS, ANNE ARUNDEL COUNTY, MARYLAND,  
*June 8th, 1909.*

Messrs. Charles E. Myers, A. Claude Kalmey, and Clarence M. Jones, registers of voters for the City of Annapolis, appointed in accordance with chapter 525 of Acts of Assembly of the State of Maryland of the year 1908, approved April 8th, in the said year.

GENTLEMEN: I apply for and demand registration as a legal voter of the City of Annapolis qualified to vote at the municipal elections held therein. I am a male citizen of the United States, of  
42 the State of Maryland and of the City of Annapolis, over twenty-one years of age, and have never been convicted of any infamous crime under the laws of the State of Maryland. I am not a taxpayer of the City of Annapolis assessed on the city books for at least five hundred dollars, nor am I a naturalized citizen nor the child of such citizen, nor was I entitled to vote at a State Election in the State of Maryland or any other State of the United States, prior to January 1st, 1868, nor am I a lawful male descendant of any person who, prior to such last mentioned date, was entitled to so vote. I am the lawful male descendant of a person who, prior to January 1st, 1868, would have been entitled to vote at a State Election in a State of the United States but for his race, color or previous condition of servitude and whose right to so vote was then and there denied by the said State on account of his race, color or previous

condition of servitude and on account of no other matter or thing whatsoever.

I notify you that I believe and claim and am advised by counsel that so much of what purports to be section 4 of the Act of Assembly, first above mentioned, beginning in the fourth and ending in the seventeenth lines of page 348 of the printed volume, containing the Laws of Maryland, of 1908, as is in the words and figures following, that is to say:

“And who shall come within any one of the three following classes of male citizens: 1. All taxpayers of the City of Annapolis assessed on the city books for at least five hundred dollars. 2. And duly naturalized citizens. 2½. And male children of naturalized citizens who have reached the age of 21 years. 3. All citizens who, prior to January 1, 1868, were entitled to vote in the State of Maryland or any other State of the United States, at a State Election, and the lawful male descendants of any person who, prior to January 1, 1868, was entitled to vote in this State or in any other State of the United States at a State Election. And no person not coming within one of the three enumerated classes shall be registered as a  
43 legal voter of the City of Annapolis, or qualified to vote at the municipal elections held therein.”

is altogether null and void and of *an* effect in law, as affecting my rights in the premises, by reason of the Fifteenth Amendment to the Constitution of the United States, and of Section 2004 of the United States Revised Statutes, enacted under the authority conferred by Section 2 of the said Amendment, whereby it is provided that:

“All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial sub-division, shall be entitled and allowed to vote at all such elections, without distinction of race color or previous condition of servitude, any constitution, law, custom, usage or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.”

I respectfully warn you that to refuse me registration as herein requested will deprive me of a right and privilege secured to me by the Constitution and Laws of the United States, and will render you, or such of you as shall join in such refusal liable to me in a proper proceeding for redress.

I remain, gentlemen,

Yours very respectfully,  
(Signed)

ROBERT BROWN.

The plaintiff here offered in evidence the official register of voters for the third ward of the City of Annapolis, taken under the provisions of Chapter 525 of the Acts of the Assembly of Maryland of 1908, which was admitted by counsel for the defendants to be the said official register, and counsel for the plaintiff read therefrom the following entries: “Residence, 60 Calvert St.; postoffice

44 address Annapolis; surname, Brown; Christian name, Robert; sworn or affirmed, sworn; age 62; nativity (Place of birth) Maryland; color, colored; residence in precinct, 30 years; residence in County, 40 years; residence in State 40 years; can you read, No; qualified voter, no; date of application June 8, 1909; why disqualified, Acts of General Assembly 1908, Chapter 525 Section 4, parts 1 and 3."

It was further admitted by counsel for the defendants that the record shown was the record used at the municipal election in the year 1909; that the book in question referred exclusively to municipal elections in the City of Annapolis, and not to National, State or County elections; that the registration was taken by the defendants and Clarence M. Jones as officers of Registration appointed under the Acts of 1908, Chapter 525 of the General Assembly of Maryland; that these entries are in the handwriting of the defendant, Charles E. Myers; that the said Robert Brown mentioned is the plaintiff and witness. It was further admitted that the record also showed that the several entries, with the exception of the one indicating the cause of the disqualification of the voter, had been lined through with red ink, the general registration law of the State of Maryland applicable to the registration of voters and referred to in the said Act of 1908, Chapter 525, requiring the crossing through in red ink to be made when an applicant for registration is denied registration. The plaintiff then offered in evidence the registration book of the third precinct of the sixth district of Anne Arundel County, which was admitted by the defendants to be the record of registered voters for the said precinct and district. It was also admitted that prior to the passage of the Act of the General Assembly of Maryland, mentioned in the declaration, Chapter 525 of the Acts of 1908, the same books were used under the law then existing for the registration of voters at state and municipal elections in the City of Annapolis, and that this is the record of all such elections, national, state, and municipal held in the City of Annapolis. That the same is the record of voters in the third ward of the City of Annapolis, and still continues to be the record for all elections except those held under the provisions of the Act of 1908, Chapter 525.

45 The plaintiff then read in evidence the following entries from the above last mentioned registration book:

"Residence, Calvert St.; Postoffice address, Annapolis; surname, Brown; christian name, Robert; sworn or affirmed, sworn; age, 54; nativity (place of birth), Maryland; color, colored; residence in precinct, 4 days; legislative district, 35 years; State, 54 years; can you read, Yes; qualified, yes; date of application, year 1902; month October; day, 7th; Robert Brown, signed, cannot write."

It was further admitted that these entries were made at the date mentioned by the officers of registration in pursuance of the laws then existing and that the Robert Brown, to whom they refer, is the plaintiff and witness.

(Examination of witness concluded. No cross-examination.)

It was admitted at the trial, by both plaintiff and defendants, that the other officer of registration, Clarence M. Jones, voted in favor of the registration of the plaintiff, but that he was outvoted by the defendants, the other two officers of registration.

It was further admitted by the plaintiff and the defendants in this cause, that the plaintiff at the time of his application to the defendants for registration was not a tax-payer in the City of Annapolis, assessed on the books of that City for at least \$500, nor was he a duly naturalized citizen, nor a male child of a naturalized citizen, who had reached the age of 21 years, nor was he the said plaintiff, prior to January 1st, 1868, entitled to vote or descended from a person who was, prior to January 1st, 1868, entitled to vote in Maryland, or in any other State, and that the two defendants refused to register the plaintiff solely because he did not come within the enumerated classes mentioned in section four of the Act of the General Assembly of Maryland of 1908, Chapter 525, the plaintiff being in other respects qualified.

46 It was also agreed between the respective parties that the Act mentioned in the declaration filed in this cause, Chapter 525 of the Acts of the General Assembly of 1908, was passed by the Legislature of Maryland and was in due form, and that the copy of the same filed with the declaration in this cause, is a true copy and may be incorporated in the record, and the Act may be read from the published laws of Maryland.

It was further agreed that any of the Acts of the General Assembly of Maryland desired to be used in argument in this Court, or in the Supreme Court of the United States, may be read from the published volumes of said Acts, and printed in the briefs of the respective counsel.

It was further admitted by the respective parties that the plaintiff's father would have been entitled to vote in the State of Maryland on the first day of January, 1868, but for the word "white" in the constitution of Maryland.

Whereupon, after the foregoing testimony and proceedings, which was all the testimony produced by the plaintiff, and all the proceedings occurring at the trial, the plaintiff rested, and the defendants having no testimony to offer and there being no evidence in rebuttal, both plaintiff and defendants closed their cases.

The plaintiff then offered the following prayer, which was granted by the court:

"The plaintiff prays the court to declare that if the court, sitting as a jury, find the facts stated in the plaintiff's declaration then its verdict must be for the plaintiff."

And the defendants, Charles E. Myers and A. Claude Kalmey, offered the following four prayers, all of which were refused by the court:

#### First Prayer.

"The defendants pray the court to instruct itself, sitting as a jury, that the plaintiff has offered no legally sufficient evidence in this

47      cause to entitled him to recover and its verdict must be for the defendants."

### Second Prayer.

"The defendants pray the court to instruct itself, sitting as jury, that there is no legally sufficient evidence in this case to show that the defendants failed to register the plaintiff on account of race, color or previous condition of servitude."

### Third Prayer.

"The defendants pray the court to instruct itself, sitting as a jury, that Chapter 525 of the Acts of 1908 of the General Assembly of Maryland is a valid existing law, and that under the provisions thereof it was the duty of the defendants to refuse to register the plaintiff, as the uncontradicted evidence in this case shows that the plaintiff was not qualified to register under the provisions of said law."

### Fourth Prayer.

"The defendants pray the court to declare as the law in this case, as follows:

"First. The defendants, being officers of registration charged with duties of a judicial nature under the laws of the State of Maryland, are not liable in an action of this kind without the proof that they have acted in bad faith or maliciously in refusing to register the plaintiff.

"Second. In order to entitled the plaintiff to recover in this case, it must be shown that the defendants, in refusing to register the plaintiff, did so under the sanction and authority of the Act or Statute of the State of Maryland, mentioned in the declaration; to wit, the Act of 1908, Chapter 525, relating to Municipal Elections in the City of Annapolis, and inasmuch as said Act does not authorize or purport to authorize the defendants to refuse to register or permit to be registered the plaintiff on account of his race, color or previous condition of servitude, the plaintiff is not entitled to recover in this case.

48      "Third. The inhibitions contained in the 15th Amendment of the Constitution of the United States against the denial or abridgment of "the right of citizens of the United States to vote" on account of race, color, or previous condition of servitude, have reference only to the right to vote which citizens of the United States have as such, as distinguishes from their right to vote as citizens of a state when they are citizens of a state; that is to say, the right to vote which they derive from the United States. A citizen of the United States, as such, has a right to vote for members of Congress, but he has not, as a citizen of the United States, a right to vote at elections for state officers, and in any event, he has not, as a citizen of the United States, a right to vote at elections of municipal corporations created by the Legislature of a State.

"Fourth. If the 15th Amendment of the Constitution of the United States be construed to be applicable to the right to vote at

elections for state officers or at elections of municipal corporations, created by the Legislature of a State, then said Amendment is void, and not a part of the Constitution of the United States, for the reason that it is in excess of the power of amendment conferred by Article 5 of the Constitution of the United States upon Congress and three-fourths of the Legislatures of the States."

And the defendants offered the following Special Exception to the plaintiff's prayer, which said Special Exception was overruled by the Court.

"The defendants object to the prayer offered by the plaintiff in this cause, but not for want of form, the necessity of setting forth in said prayer the detailed facts in the said several declarations being hereby waived."

"The defendants also specially except to said prayer on the ground that there is no evidence in this cause legally sufficient to sustain the said prayer of plaintiff."

49 And the Court granted the plaintiff's prayer, and refused and rejected the defendants' First, Second, Third and Fourth Prayers, and overruled the defendants' special exception to the plaintiff's prayer, and the defendants then and there asked leave to except, and did except to each of the following rulings, separately: To the granting by the Court of the plaintiff's prayer; to the refusal of the Court to grant the defendants' First prayer; to the refusal of the Court to grant the defendants' Second prayer; to the refusal of the Court to grant the defendants' Third prayer; to the refusal of the Court to grant the defendants' Fourth prayer; and to the refusal of the Court to sustain the defendants' special exception to the plaintiff's prayer, and pray the Court to sign and seal this their first Bill of Exceptions, which is, accordingly, done this 11th day of May, 1911.

THOS. J. MORRIS, *Judge*. [SEAL.]

Approved on behalf of Pl'ff.

C. J. B.,  
Pl'ff's Att'y.

50 *Petition of Defendants for Writ of Error and Assignment of Errors.*

Filed May 17, 1911.

In the Circuit Court of the United States for the District of Maryland.

ROBERT BROWN

VS.

CHARLES E. MYERS and A. CLAUDE KALMEY.

And now come Charles E. Myers and A. Claude Kalmey, defendants, in the above entitled case, and say,

That on or about the 6th day of February, 1911, the Circuit Court of the United States for the District of Maryland, entered a judg-

ment in said case in favor of the plaintiff, Robert Brown, and against these defendants, Charles E. Myers and A. Claude Kalmey, in which judgment, and the proceedings had prior thereto in said case, certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors which is filed with this petition, and is intended to be taken as a part of the same.

Wherefore these defendants pray that a writ of error may issue in their behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this case duly authenticated may be sent to the Supreme Court of the United States.

WILLIAM L. MARBURY,  
ISAAC LOBE STRAUS,  
RIDGELY P. MELVIN,  
WILLIAM L. RAWLS,  
*Attorneys for the Defendants.*

51 In the Circuit Court of the United States for the District of Maryland.

ROBERT BROWN

VS.

CHARLES E. MYERS and A. CLAUDE KALMEY.

*Assignment of Errors.*

The defendants in this action, in connection with their petition for writ of error, make the following assignment of errors, which they aver exist;

1. The court erred in failing and refusing to sustain the demurrer of these defendants to the declaration of the plaintiff filed in this cause.

2. The court erred in refusing to rule at the hearing upon the demurrer filed by these defendants to the declaration of the plaintiff in this cause, that the said declaration failed to show any ground of jurisdiction in this court over or in respect to the parties, matters and things set forth therein.

3. The court erred in refusing to rule at the hearing upon the demurrer filed by these defendants to the declaration of the plaintiff in this cause, that by the laws under which they, the defendants, were appointed and acting the defendants were charged with and exercising, in respect to the transactions, matters and things complained of and set forth in said declaration, duties, functions and powers of a judicial nature; that in the discharge and exercise of said duties, functions and powers they, the defendants, were not and cannot be held legally responsible for anything more than an honest and faithful exercise of their judgment, and that said declaration fails to allege that the defendants, or either of them, did, or failed

52 to do, any act to the prejudice or injury of the plaintiff either willfully, maliciously, fraudulently or corruptly, so as to render them, or either of them, legally liable to the plaintiff in the premises.

4. The court erred in refusing to rule at the hearing upon the demurrer filed by the defendants to the declaration of the plaintiff in this cause, that as the declaration charges on its face that the Act of the General Assembly of Maryland of 1908, Chapter 525, under which, as the declaration further avers, the defendants were appointed and acted, was and is illegal and unconstitutional and void and the declaration fails to show that the defendants were authorized to register, or charged with any duty of registering the plaintiff at the time he presented himself for registration, as set forth in said declaration, under any other statute or law; that therefore upon the averments and charges of the declaration the defendants had no authority, and were charged with no duty, to register the plaintiff when he presented himself to be registered, as set forth in the declaration and accordingly are not liable to the plaintiff in the premises.

5. The court erred in refusing to sustain the demurrer filed by the defendants to the declaration of the plaintiff in this cause, because the defendants are not subject or liable to an action for damages for refusing to register the plaintiff under said Act of the General Assembly of Maryland of 1908, Chapter 525, which, as charged and shown by said declaration forbade the defendants to register the plaintiff when he presented himself for registration, as set forth in said declaration, and which said Act, as appears from its context, imposed criminal penalties upon the defendants for any violation of its terms and provisions.

6. The court erred in refusing to sustain the demurrer filed by the defendants to the declaration of the plaintiff in this cause, because said declaration fails to allege that the action of the defendants, in refusing to register the plaintiff, was wilful or malicious.

53 7. The Court erred in refusing to sustain the demurrer filed by the defendants to the declaration of the plaintiff in this cause, because the allegations contained in the declaration in this cause do not show a case where the State of Maryland, or any person acting under its authority, has denied or abridged the right of the plaintiff to register on account of race, color or previous condition of servitude.

8. The court erred in refusing to rule at the hearing upon the demurrer filed by the defendants to the declaration of the plaintiff in this cause, that the inhibitions contained in the Fifteenth Amendment against the denial or abridgement of the right of citizens of the United States to vote on account of race, color or previous condition of servitude, is by the plain language of the Amendment made to apply only to the right to vote, which citizens of the United States have, by virtue of such citizenship, that is the right to vote derived from the United States and that the inhibitions therein contained do not apply, to, or in any way effect, the right to vote conferred by a State upon any of its citizens.

9. The court erred in refusing to rule at the hearing upon the

demurrer filed by the defendants to the declaration of the plaintiff in this cause, that allowing the broadest possible construction the right of citizens of the United States to vote mentioned in the Fifteenth Amendment, which the States are thereby prohibited from denying or abridging, on account of race, color or previous condition of servitude, is the right to vote at elections of a public general character, and does not include the right to vote in corporate bodies created solely by legislative will, and wherein such right is dependent altogether upon legislative discretion as in municipal corporations.

10. The court erred in refusing to rule at the hearing upon the demurrer filed by the defendants to the declaration of the plaintiff in this cause, that if construed to have reference to voting at State and Municipal elections the Fifteenth Amendment would be beyond the amending power conferred upon three-fourths of the  
54 States by Article V of the Constitution of the United States, and therefore the Amendment should not receive that construction if it is fairly open to a more limited construction.

11. The Court erred in holding, in its ruling upon the demurrer of the defendants to the declaration of the plaintiff filed in this cause, that any part of Section 4 of the Act of Assembly of Maryland of 1908, Chapter 525, was and is in conflict with the Fifteenth Amendment of the Constitution of the United States.

12. The court erred in granting the plaintiff's first and only prayer, as follows: "The plaintiff prays the court to declare that if the court, sitting as a jury, find the facts stated in the plaintiff's declaration then their verdict must be for the plaintiff."

13. The court erred in refusing to grant the defendants' first prayer, as follows: "The defendants pray the court to instruct itself, sitting as a jury, that the plaintiff has offered no legally sufficient evidence in this case to entitle him to recover and its verdict must be for the defendants."

14. The court erred in refusing to grant the defendants' second prayer, as follows: "The defendants pray the court to instruct itself, sitting as a jury, that there is no legally sufficient evidence in this case to show that the defendants failed to register the plaintiff on account of race, color or previous condition of servitude."

15. The court erred in refusing to grant the defendants' third prayer, as follows: "The defendants pray the court to instruct itself, sitting as a jury, that Chapter 525 of the Acts of 1908 of the General Assembly of Maryland is a valid existing law, and that under the provisions thereof it was the duty of the defendants to refuse to register the plaintiff, as the uncontrodicted evidence in this case shows that the plaintiff was not qualified to register under the provisions of said law."

55 16. The court erred in refusing to grant the defendants' fourth prayer as follows: "The defendants pray the court to declare as the law of this case, as follows:

"First. The defendants, being officers of registration charged with the duties of a judicial nature under the laws of the State of Maryland, are not liable in an action of this kind without the proof that

they have acted in bad faith or maliciously in refusing to register the plaintiff.

"Second. In order to entitle the plaintiff to recover in this case, it must be shown that the defendants, in refusing to register the plaintiff, did so under the sanction and authority of the Act or the Statute of the State of Maryland, mentioned in the declaration; to wit, the Act of 1908, Chapter 525, relating to Municipal Elections in the City of Annapolis, and inasmuch as said Act does not authorize or purport to authorize the defendants to refuse to register or permit to be registered the plaintiff on account of his race, color or previous condition of servitude, the plaintiff is not entitled to recover in this case.

"Third. The inhibitions contained in the 15th Amendment of the Constitution of the United States against the denial or abridgement of "the right of citizens of the United States to vote" on account of race, color or previous condition of servitude, have reference only to the right to vote which citizens of the United States have as such, as distinguished from their right to vote as citizens of a state when they are citizens of a state; that is to say, the right to vote which they derive from the United States. A citizen of the United States, as such, has a right to vote for members of Congress, but he has not, as a citizen of the United States, a right to vote at elections for state officers, and in any event, he has not, as a citizen of the United States, a right to vote at elections of municipal corporations created by the Legislature of a state.

56 "Fourth. If the 15th Amendment of the Constitution of the United States be construed to be applicable to the right to vote at elections for state officers or at elections of municipal corporations, created by the Legislature of a State, then said Amendment is void, and not a part of the Constitution of the United States, for the reason that it is in excess of the power of amendment conferred by Article V of the Constitution of the United States upon Congress and three-fourths of the Legislatures of the states."

17. The court erred in overruling the defendants' special exception to plaintiff's prayer, as follows: "The defendants object to the prayer offered by the plaintiff in this cause, but not for want of form, the necessity of setting forth in said prayer the detailed facts in the said several declarations being hereby waived.

"The defendants also specially except to said prayer on the ground that there is no evidence in this cause legally sufficient to sustain the said prayer of plaintiff."

18. The court erred in entering judgment in favor of the plaintiff and against the defendants.

Wherefore the defendants pray that the judgment of the said Circuit Court of the United States for the District of Maryland be reversed.

WILLIAM L. MARBURY,  
ISAAC LOBE STRAUS,  
RIDGELY P. MELVIN,  
WILLIAM L. RAWLS,

*Attorneys for Defendants.*

57 *Order of Court Allowing Writ of Error.*

Filed May 17, 1911.

In the Circuit Court of the United States for the District of Maryland.

ROBERT BROWN

VS.

CHARLES E. MYERS and A. CLAUDE KALMEY.

This 17th day of May, 1911, the defendants, Charles E. Myers and A. Claude Kalmey, by their attorneys, file herein and present to the Court their petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by them, praying also that a transcript of the record, and proceedings and papers, upon which the judgment herein was rendered, duly authenticated may be sent to the Supreme Court of the United States and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error upon the defendants giving bond according to law in the sum of \$500.00 which shall operate as a supersedeas bond.

THOS. J. MORRIS, *Judge.*58 *Writ of Error Bond.*

Filed June 23, 1911.

Know all men by these presents, That we, Charles E. Myers and A. Claude Kalmey of the City of Annapolis, Maryland, as principals, and Henry B. Myers and Joseph H. Bellis, also of said city and state, as sureties are held and firmly bound unto Robert Brown in the full and just sum of Five Hundred Dollars, to be paid to the said Robert Brown — certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this 23rd day of June, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a Circuit Court of the United States for the District of Maryland, in a suit depending in said Court, between Robert Brown, plaintiff and Charles E. Myers and A. Claude Kalmey, defendants, a judgment was rendered against the said Charles E. Myers and A. Claude Kalmey and the said Charles E. Myers and A. Claude Kalmey having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Robert Brown citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Charles E. Myers and A. Claude Kalmey shall prosecute their writ of error to effect, and answer all damages and costs if they fail to to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CHAS. E. MYERS.	[SEAL.]
A. C. KALMEY.	[SEAL.]
HENRY B. MYERS.	[SEAL.]
JOSEPH H. BELLIS.	[SEAL.]

Sealed and delivered in presence of  
SARAH E. WOOLLEY.

Approved by  
THOS. J. MORRIS,  
*Judge U. S. Circuit Court  
for District of Maryland.*

59 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between Robert Brown, Plaintiff and Charles E. Myers and A. Claude Kalmey, Defendants, a manifest error hath happened, to the great damage of the said Charles E. Myers and A. Claude Kalmey as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 23rd day of June, in the year of our Lord one thousand nine hundred and eleven.

[The Seal of the Circuit Court, Maryland.]

ARTHUR L. SPAMER,  
*Clerk of the Circuit Court of the United  
States for the District of Maryland.*

Allowed by  
THOS. J. MORRIS,  
*Judge of the Circuit Court of the  
United States for the District of Maryland.*

60 UNITED STATES OF AMERICA, ss:

To Robert Brown, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of the United States for the District of Maryland wherein Charles E. Myers and A. Claude Kalmey are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Thomas J. Morris, Judge of the Circuit Court of the United States for the District of Maryland this twenty third day of June, in the year of our Lord one thousand nine hundred and eleven.

[The Seal of the Circuit Court, Maryland.]

THOS. J. MORRIS,  
*Judge of the Circuit Court of the United  
States for the District of Maryland.*

Attest:

ARTHUR L. SPAMER,  
*Clerk of said Circuit Court.*

[Endorsed:] Service of the within Citation admitted this 30th day of June, 1911. Charles J. Bonaparte, Edgar H. Gans, Attorney-for Defendant in Error.

61 *Order to Transmit Record.*

In pursuance of the writ of error aforesaid, and according to the statute in such case made and provided, and of the order of court here, a record of the judgment aforesaid with all things thereunto relating, together with the said writ of error annexed is hereby transmitted to the said Supreme Court of the United States, accordingly.

Test:

ARTHUR L. SPAMER, *Clerk.*

*Clerk's Certificate.*

UNITED STATES OF AMERICA,  
*District of Maryland, to wit:*

I, Arthur L. Spamer, Clerk of the Circuit Court of the United States for the District of Maryland, do certify that the foregoing is a true transcript of the record and proceedings of the said court, together with all things thereunto relating, in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of the said Circuit Court, this 14th day of July, 1911.

[The Seal of the Circuit Court, Maryland.]

ARTHUR L. SPAMER, *Clerk.*

Endorsed on cover: File No. 22,808. Maryland C. C. U. S. Term No. 732. Charles E. Myers and A. Claude Kalmey, plaintiffs in error, vs. Robert Brown. Filed July 19th, 1911. File No. 22,808.

4  
**FILED.**

OCT 22 1913

JAMES H. McKENNEY,  
CLERK.

**ANNAPOLIS CASES,**  
**Nos. ~~307, 308, 309~~. 8, 9 & 10**

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IN THE  
**Supreme Court of the United States.**

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OCTOBER TERM, **1914**

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CHARLES E. MYERS AND A. CLAUDE KALMEY,  
PLAINTIFFS IN ERROR,

vs.

JOHN B. ANDERSON, ET AL.

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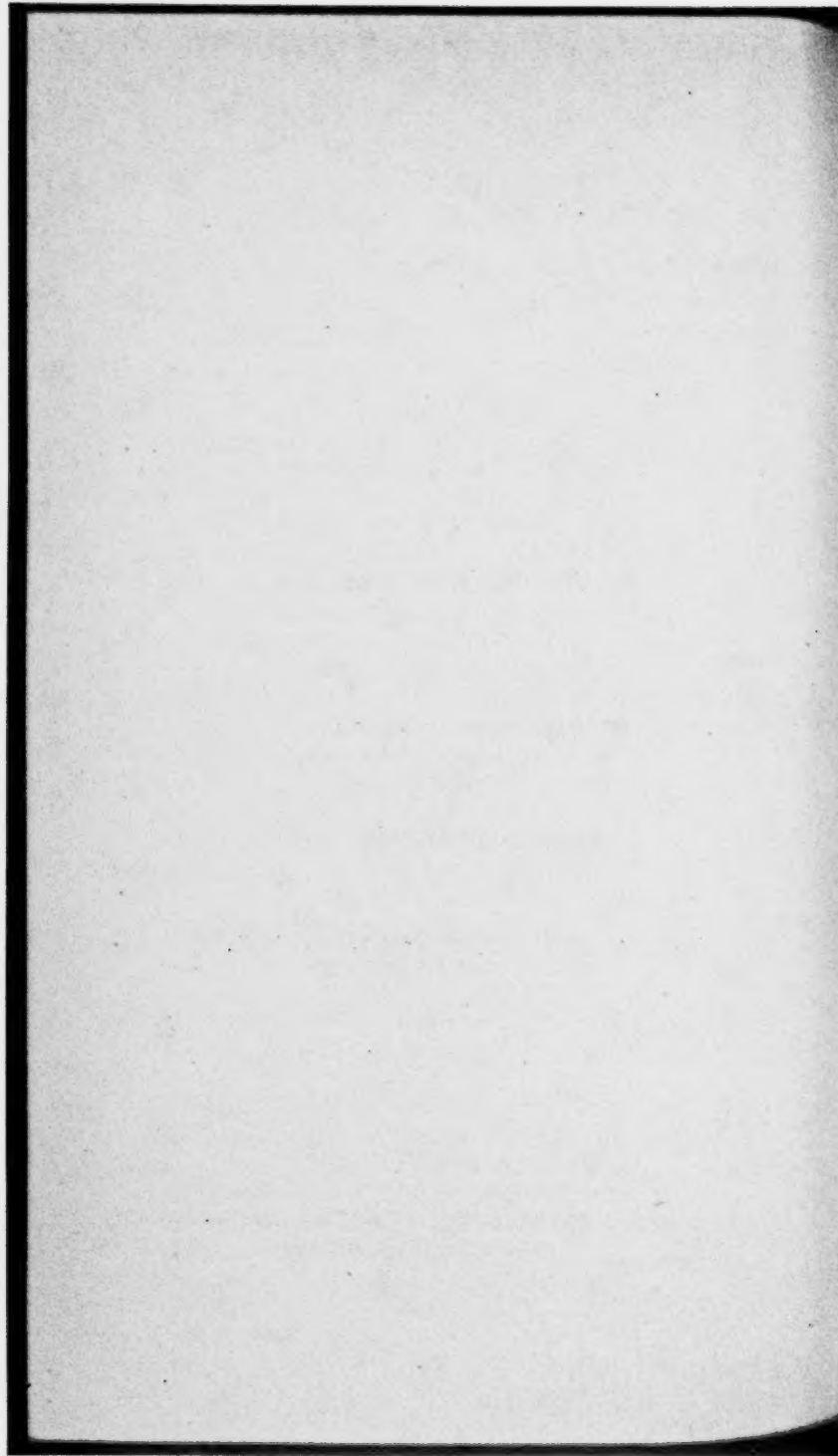
**BRIEF FOR PLAINTIFFS IN ERROR.**

WILLIAM L. MARBURY, BALTIMORE, MD.,  
RIDGLEY P. MELVIN, ANNAPOLIS, MD.,  
WILLIAM L. RAWLS, BALTIMORE, MD.,

*of Counsel*

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(a) The portions of Section 4 of the Annapolis Registration Law which are alleged in the declaration (Record, page 2) to be void because of being in conflict with the Fifteenth Amendment, constitute the only part of that law which makes any change in the pre-existing law prescribing qualifications for registration and suffrage in the City of Annapolis. The Legislature would, therefore, certainly not have enacted this law without these provisions. Therefore, an averment that these provisions are void is equivalent to an averment that the whole Annapolis Registration Law is void. Therefore, under *Giles vs. Harris* the plaintiffs are not entitled to maintain the suit..... 53-60

(b) Aside from the above, and *irrespective of the allegations of the declaration*, it is plain that the Annapolis Registration Law is either valid as a whole or void as a whole. But the defendants as registrars had no power or authority to register the plaintiffs, except such as was derived from this law. It is admitted that they were appointed under that law, and had no power to act under any other law. If, therefore, the law in question is void, they had no power or legal authority to register the plaintiffs, and the plaintiffs cannot recover damages against them on account of their failure to do so..... 57

- (c) Even if the Court were to be of opinion that Class 3, the so-called Grandfather's Clause, *alone* was void, that it was separable from the balance of the act, and that the balance of the Act was valid, still the plaintiffs would not be entitled to recover, because it is admitted that they were disqualified under Classes 1, 2 and 2½, the Property Clause, and Naturalized Citizen Clause of the Act.. 57
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### III. Scope of the Fifteenth Amendment.

- (a) The inhibitions contained in the Fifteenth Amendment against the denial or abridgment of "the right of citizens of the United States to vote" on account of race, color or previous condition of servitude, is by the plain language of the Amendment made to apply only to the right to vote which citizens of the United States have by virtue of such citizenship, that is, the right to vote derived from the United States, and not such right to vote as they derive from the States, and the inhibition therein contained does not apply to or in any way affect the right of a citizen of a *State* to vote at *State* or *municipal* elections, such right being derived exclusively from the State, and not inhering in any man in his capacity as "a citizen of the United States" ..... 60
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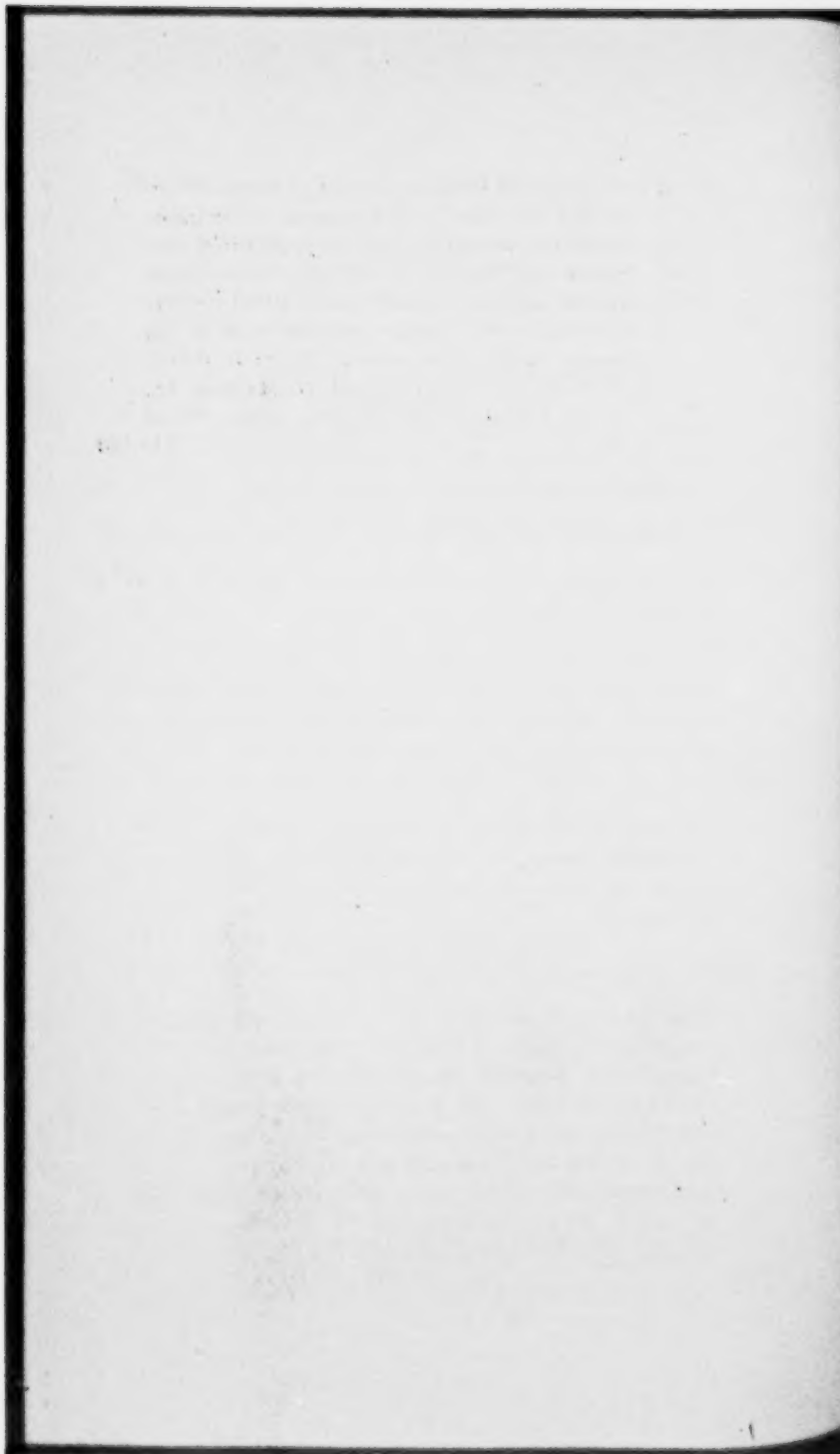
(a) The words "right to vote" as used in the statutes or constitutions generally means the right to vote at elections of a public general character, and not at municipal elections. There is a great weight of authority to this effect, especially Maryland cases..... 93-100

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(a) "Where a statute is susceptible of two constructions, by one of which **grave and doubtful** constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *U. S. vs. Delaware & Hudson Co* , 213 U. S., 407.. 105-106

(b) The right to determine for itself who shall constitute its electorate, is one of the "functions essential to the *existence* of a State," and any invasion of that right is beyond the power of amendment conferred upon three-fourths of the States by the people in the adoption of the Constitution; otherwise there could be no indestructible States. *Texas vs. White*, 7 Wall., 700; *Lane County vs. Oregon*, 7 Wallace, 71..... 107

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CHARLES E. MYERS AND  
A. CLAUDE KALMEY,  
PLAINTIFFS IN ERROR,

vs.

JOHN B. ANDERSON,  
ET AL.

IN THE  
**Supreme Court of  
the United States**

OCTOBER TERM, 1913.

Nos. 58, 59, 60.

ON WRIT OF ERROR  
TO THE

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MARYLAND.

**BRIEF FOR PLAINTIFFS IN ERROR.**

These cases come up on Writ of Error to the District Court for the District of Maryland. The appellants, the defendants below, seek the reversal of the judgments rendered against them in that Court.

**STATEMENT OF THE CASES.**

These are three suits for damages brought by the defendant in error against the defendants, Myers and KalmeY, who were two of the registrars of voters appointed together with one Clarence M. Jones, for the Third Ward of the City of Annapolis, Maryland, in accordance with the provisions of Section 1 of the Acts of the General Assembly of Maryland of 1908, Chapter 525.

Damages are claimed because of the refusal of the defendants to register the plaintiffs. These registrars had no authority or lawful power to register the Plaintiffs, except such power or authority as is conferred upon them by said Act of the General Assembly.

It is not alleged or claimed that they possessed any such power by virtue of the pre-existing law or any other law.

*If said Act of 1908 is for any reason void, then, of course, the defendants had no lawful power or authority to register the plaintiffs, and cannot be held liable in damages for failure to do so.*

The declaration in each case contained the following averment:

“For that, on April 8th, 1908, there was approved by the Governor of Maryland an Act of Assembly of such tenor and effect as is shown by the printed reproduction thereof published by authority of the said State in the volume professing to contain the laws of Maryland for the year 1908, commencing on page 347 of the said printed volume under the heading ‘Chapter 525—*An Act to fix the qualifications of voters at municipal elections in the City of Annapolis and to provide for the registration of said voters,*’ and which is prayed to be taken as part of this declaration and likewise as appears by a true copy of the Act of Assembly aforesaid, hereunto annexed, marked ‘Plaintiff’s Exhibit Act’ and which is prayed to be taken and considered as a part of this declaration with the same effect as if herein set forth in words and figures at length; and, as appears by the said legally authorized printed reproduction and likewise by the exhibit above mentioned, the fourth section of the Act of Assembly above mentioned was, and is in the words and figures following, that is to say:

“ ‘Sec. 4. Said registers of voters shall at said registration register all male citizens of the said City of Annapolis applying for registration of twenty-one years of

age or over, who have resided therein one year preceding any municipal election, who have never been convicted of any infamous crime under the laws of the State of Maryland, and who shall come within any one of the three following classes of male citizens. 1. All taxpayers of the City of Annapolis assessed on the city books for at least five hundred dollars. 2. And duly naturalized citizens. 2½. And male children of naturalized citizens who have reached the age of twenty-one years. 3. All citizens who, prior to January 1, 1868, were entitled to vote in the State of Maryland or any other State of the United States at a State election, and the lawful male descendants of any person who, prior to January 1, 1868, was entitled to vote in this State or any other State of the United States at a State election, and no person not coming within one of the three enumerated classes shall be registered as a legal voter of the City of Annapolis qualified to vote at municipal elections held therein, and any person so duly registered shall, while registered, be duly qualified to vote at any municipal election held in said city; said registration shall in all other respects conform to the laws of the State of Maryland relating to and providing for registration in the State of Maryland.'

"Of which said section so much as is contained in the following passage, namely: 'And who shall come within any one of the three following classes of male citizens. 1. All taxpayers of the City of Annapolis assessed on the city books for at least five hundred dollars. 2. And duly naturalized citizens. 2½. And male children of naturalized citizens who have reached the age of 21 years. 3. All citizens who, prior to January 1, 1868, were entitled to vote in the State of Maryland or any other State of the United States at a State election, and the lawful male descendants of any person who prior to January 1, 1868, was entitled to vote in this State or in any other State of

the United States at a State election, was and is contrary to and forbidden by the Constitution of the United States and Laws of the United States enacted in pursuance thereof; and more especially to the Fifteenth Amendment to the Constitution of the United States, and to so much of the Acts of Congress, approved May 31, 1870, and printed in full by the authority of the United States in 16 Statutes at Large, 140 and likewise constituting Section 2004 of the United States Revised Statutes, as is in the words and figures following, that is to say:

“All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, territory, district, county, city, parish, township, school district, municipality or other territorial subdivision shall be entitled and allowed to vote at all such elections without distinction of race, color or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory by or under its authority to the contrary notwithstanding, in so far as the said portion of the said section of the said Act of Assembly of the said State of Maryland affects or professes or attempts to affect the right to vote of any citizen of the United States by reason of his race, color or previous condition of servitude, or the race, color or previous condition of servitude of any of his ancestors, prior to the first day of January in the year one thousand eight hundred and sixty-eight, and being thus, as aforesaid, contrary to and forbidden by the Supreme law of the land, the same was and is wholly invalid and of no effect in law, as affecting the rights of any citizen under and by virtue of Section 2 of Article VI of the Constitution of the United States.

The plaintiff Anderson in his declaration, after the above averment, proceeds to allege:

That he is a citizen of the United States, born in Anne Arundel County, in the State of Maryland, in the year one thousand eight hundred and thirty-four. That prior

to January 1, 1868, he would have been entitled to vote at any election held in Anne Arundel County, in the State of Maryland, but for the word "white" in the first sentence of Section 1 of Article 1, of the Constitution of Maryland, then in force, which word was subsequently in legal effect expunged by the adoption of the Fifteenth Amendment to the Constitution of the United States. That he then and there and always was, and is now of the negro race and black color, and by reason of his said race and color, and for no other reason whatsoever, he was prior to and on the first day of January, 1868, excluded from the elective franchise in the State of Maryland and from voting at municipal elections in the City of Annapolis. That he has never been guilty of larceny or other infamous crime, etc. That he has been a voter at municipal elections in the City of Annapolis for thirty-eight years.

The declarations of Brown and Howard allege substantially that prior to January 1, 1868, their father and grandfather, respectively, would have been entitled to vote in the State of Maryland, except for the word "white" in the Maryland Constitution. That neither of these plaintiffs has ever been guilty of larceny or other infamous crime, etc. That both of them have heretofore voted at municipal elections in the City of Annapolis.

All the declarations then allege that the plaintiffs on the seventh day of June, 1909, applied to the defendants, and the said Clarence M. Jones as registers as aforesaid, for registration as legal voters of the City of Annapolis, in accordance with the provisions of the said Act, and demanded that they be registered.

The plaintiff, Anderson, alleges that the defendants, notwithstanding the protest of himself and the vote to the contrary of the said Clarence M. Jones, the defendants, as such registers as aforesaid declined and refused to permit him to be so registered as a legal voter as aforesaid, and thus restricted plaintiff's right of suffrage which he

had enjoyed for more than thirty-eight years, avowedly and only because the said plaintiff, by reason of his race and color and for no other reason whatsoever, was not entitled to vote in the State of his residence, to wit, the State of Maryland prior to the first day of January, one thousand eight hundred and sixty-eight; and their said refusal to so register plaintiff was caused and occasioned by no other matter or thing whatsoever.

The declarations of Brown and Howard contain an allegation substantially similar to the above, with the exception that it is stated that the refusal of defendants to register them was because their father and grandfather, respectively, were not entitled to vote in the State of their residence, to wit, the State of Maryland, prior to the first day of January, 1868.

All three declarations then conclude with the averment that by such wrongful, illegal and oppressive refusal and declination on the part of the defendants as registers to place the name of the plaintiffs on the registration list of voters entitled to vote at municipal elections in the City of Annapolis, the plaintiffs have been and are, under color of an alleged statute of the State of Maryland, subjected and caused to be subjected to the deprivation of a right, privilege and immunity secured to them by the Constitution and laws, namely, of the privilege and immunity to have their right to vote at elections in a city, a municipality and a territorial sub-division of the State of Maryland permitted and allowed, without distinction or discrimination against them by reason of race or color on their part. That the plaintiffs have been thereby deprived of their right to vote at an election held in the said City of Annapolis on the 12th day of July, 1909, and of the right to vote at all future elections in the said city, and are subjected to an unjust stigma, etc.

Plaintiffs separately claim \$5,000 damages.

The defendants demurred to the declaration in each

of the three cases, and the grounds of demurrer were as follows:

"1. That said declaration is insufficient in law and bad in substance.

2. That said declaration fails to show any ground of jurisdiction in this Honorable Court over or in respect to the parties, matters and things set forth therein.

3. That by the laws under which they, the defendants, were appointed and acting, the defendants were charged with and exercising in respect to the transactions, matters and things complained of, and set forth in said declaration, duties, functions and powers of a judicial nature; that in the discharge and exercise of said duties, functions and powers, they, the defendants, were not and cannot be held legally responsible for anything more than an honest and faithful exercise of their judgment; and that said declaration fails to allege that the defendants, or either of them, did or failed to do any act to the prejudice or injury of the plaintiff, either wilfully, maliciously, fraudulently or corruptly, so as to render them or either of them legally liable to the plaintiff in the premises.

4. Because the declaration charges on its face that the Act of the General Assembly of Maryland, 1908, Chapter 525, under which, as the declaration further avers, the defendants were appointed and acting, was and is illegal, unconstitutional and void, and the declaration fails to show that the defendants were authorized to register, or charged with any duty of registering the plaintiff at the time he presented himself for registration, as set forth in said declaration under any other statute or law; that, therefore, upon the averments and charges of the declaration, the defendants had no authority and were charged with no duty to register the plaintiff when he presented himself to be registered, as set forth further in the declaration, and accordingly, are not legally liable to the plaintiff in the premises.

5. Because the defendants are not subject or liable to an action for damages for refusing to register the plaintiff under said Act of 1908, chapter 525, which, as charged and shown by the said declaration, forbade the defendants to register the plaintiff when he presented himself for registration, as set forth in said declaration; and which said Act, as appears from its context, imposed criminal penalties upon the defendants for any violation of its terms and provisions.

6. And for other reasons and grounds to be assigned at the hearing."

7. That the allegations contained in the declaration in this case do not show a case where the State of Maryland, or any person acting under its authority, has denied or abridged the right of the plaintiffs to vote on account of race, color or previous condition of servitude.

8. That the inhibition contained in the Fifteenth Amendment against the denial or abridgment of the right of citizens of the United States to vote on account of race, color or previous condition of servitude, is by the plain language of the amendment made to apply to the right to vote which citizens of the United States have by virtue of such citizenship; that is, the right to vote derived from the United States, and that the inhibitions therein contained do not apply to or in any way affect the right to vote conferred by the State upon any of its citizens.

9. Allowing the broadest possible construction, the right of citizens of the United States to vote mentioned in the Fifteenth Amendment, which the States are thereby prohibited from denying or abridging on account of race, color or previous condition of servitude, is a right to vote at elections of a public general character, and does not include the right to vote in corporate bodies created solely by legislative will, and wherein such right to vote is dependent upon legislative discretion, such as *municipal* corporations.

10. That if construed to have reference to the right to vote at State or municipal elections, the Fifteenth Amendment would be beyond the amending power conferred upon three-fourths of the States by Article 5 of the Constitution, and, therefore, the Amendment should not receive that construction if it is fairly open to a more limited construction (Record, pages 10-11).

After argument, the Court made an order overruling the demurrer, with leave to the defendants to plead (Record, page 2).

Thereupon the defendants pleaded the general issue in accordance with the practice in the State of Maryland, "that they did not commit the wrongs alleged," the same amounting to a general denial, and putting in issue of all the averments of the declaration (Record, page 20).

By agreement of counsel, the cases were tried before the Court without a jury, and resulted in verdicts for the plaintiffs in each case for \$250, upon which the Court entered judgment.

Thereupon the defendants sued out the Writs of Error in these cases.

The testimony and admissions upon which the cases were tried were set forth in the defendants' Bill of Exception (Record, pages 23-30).

The plaintiffs offered evidence or admissions tending to prove all the averments of their declarations, except, we think, that portion of the following averments which is put in italics:

"Yet, said defendants, wholly regardless of their said duty and obligations, and of the plaintiffs' rights in the premises; notwithstanding the protests of the said plaintiffs, and the vote to the contrary of the said Clarence M. Jones and such register as aforesaid, declined and refused the said plaintiffs to be registered as such legal voters as aforesaid; and thus restricted and abridged the plaintiffs' right of suf-

frage, which he had enjoyed for more than thirty-eight years, avowedly, and only because *the plaintiff, by reason of his race, color, and for no other reason, was not entitled in the State of his residence, to wit, the State of Maryland, prior to the first day of January, one thousand eight hundred and sixty-eight, and as said refusal to so register the said plaintiff was caused and occasioned by no other matter or thing whatsoever*" (Record, page 5).

The only testimony or admissions presented by the defendants in any way bearing upon this averment appears on page 27 of the Record, as follows:

"It was further admitted by the plaintiffs and defendants in this cause that the plaintiff at the time of his application to the defendant for registration was not a taxpayer in the City of Annapolis, assessed on the books of that City for at least \$500, nor was he a newly naturalized citizen, nor a male child of a naturalized citizen who had reached the age of 21 years; nor was he, the said plaintiff, prior to January 1, 1868, entitled to vote in Maryland or any other State; and that the two defendants refused to register the *plaintiff solely because he did not come within the enumerated classes mentioned in Section 4 of the Act of the General Assembly of Maryland, 1908, Chapter 525, the plaintiff being in other respects qualified.*"

Thereupon, at the close of the testimony, the plaintiffs offered the following prayer, which was granted by the Court:

"The plaintiffs pray the Court to declare that if the Court, sitting as a jury, finds the facts stated in the plaintiffs' declaration, then the verdict must be for the plaintiffs."

To this prayer the defendants excepted generally and also specially, "on the ground that there is no evidence

in the cause legally sufficient to sustain the prayer of the plaintiffs" (Record, pages 28-29).

At the same time the defendants offered the following prayers:

"FIRST PRAYER.

"The defendants pray the Court to instruct itself, sitting as a jury, that the plaintiff has offered no legally sufficient evidence in this cause to entitle him to recover, and its verdict must be for the defendants."

"SECOND PRAYER.

"The defendants pray the Court to instruct itself, sitting as a jury, that there is no legally sufficient evidence in this case to show that the defendants failed to register the plaintiff on account of race, color or previous condition of servitude."

Both these prayers were refused by the Court, and it will be argued that such ruling of the Court was erroneous, and for that reason, if for no other, the judgments in these cases should be reversed.

The defendants then offered the following prayers:

"THIRD PRAYER.

"The defendants pray the Court, sitting as a jury, to instruct itself that Chapter 525 of the Acts of 1908 of the General Assembly of Maryland is a valid existing law, and that under the provisions thereof it was the duty of the defendants to refuse to register the plaintiff, as the uncontradicted evidence in this case shows that the plaintiff was not qualified to register under the provisions of said law."

"FOURTH PRAYER.

"The defendants pray the Court to declare as the law in this case as follows:

**"FIRST**—The defendants, being officers of registration charged with duties of a judicial nature under the laws of the State of Maryland, are not liable in an action of this kind without the proof that they have acted in bad faith, or maliciously, in refusing to register the plaintiff.

**"SECOND**—In order to entitle the plaintiff to recover in this case it must be shown that the defendants, in refusing to register the plaintiff, did so under the sanction and authority of the Act or Statute of the State of Maryland, mentioned in the declaration, to wit, the Act of 1908, Chapter 525, relating to municipal elections in the City of Annapolis, and inasmuch as said Act does not authorize or purport to authorize the defendants to refuse to register or permit to be registered the plaintiff on account of his race, color or previous condition of servitude, the plaintiff is not entitled to recover in this case.

**"THIRD**—The inhibitions contained in the Fifteenth Amendment of the Constitution of the United States against the denial or abridgment of 'the right of citizens of the United States to vote' on account of race, color or previous condition of servitude, have reference only to the right to vote which citizens of the United States have as such, as distinguished from their right to vote as citizens of a State when they are citizens of a State; that is to say, the right to vote which they derive from the United States. A citizen of the United States, as such, has a right to vote for members of Congress, but he has not, as a citizen of the United States, a right to vote at elections of municipal corporations as created by the Legislature of a State.

**"FOURTH**—If the Fifteenth Amendment of the Constitution of the United States be construed to be applicable to the right to vote at elections for State officers or at elections of municipal corporations cre-

ated by the Legislature of a State, then said Amendment is void and not a part of the Constitution of the United States, for the reason that it is in excess of the power of amendment conferred by Article 5 of the Constitution of the United States upon Congress and three-fourths of the Legislatures of the States."

These prayers were also refused by the Court, and special exceptions of the defendants to the plaintiffs' prayer were overruled.

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### ERRORS IN THE RULINGS OF THE DISTRICT COURT.

It is submitted that the learned Court below erred in the following particulars:

(1) In failing and refusing to adjudge and rule that in view of the fact that the defendants, officers of registration appointed under Annapolis Registration Law, Chapter 525, Acts of the General Assembly of Maryland, 1908, to register voters for the purpose of voting at municipal elections in the City of Annapolis, had no lawful power or authority to register the plaintiffs, except such power or authority, if any, as was conferred by the said Registration Law, if said Act is void because of being in conflict with the Fifteenth Amendment of the Constitution of the United States, or for any other reason, then the defendants had no lawful power or authority to register the plaintiffs, and the plaintiffs are not entitled to recover damages in this suit against said defendants because of their failure and refusal to so register the plaintiffs; that on the other hand, if said Registration Law is valid, the defendants properly refused to register the plaintiffs, for which reason the question as to whether said Registration Law is valid or invalid, constitutional or unconstitutional, is not a *material* question, and, there-

fore, not a question proper to be passed upon or determined in this case, and the demurrer should therefore have been sustained.

(2) In failing to rule that the averment made by the plaintiffs in their declaration (Record, page 2), that so much of Section 41 of said Annapolis Registration Law as provides that in addition to being male citizens of the City of Annapolis of twenty-one years of age or over, who had resided in the said city one year preceding any municipal election, and never been convicted of any infamous crime, an applicant for registration under said law should come within one or the other of four classes, to wit: (1) "All taxpayers of the City of Annapolis assessed on city book for at least \$500.00; or (2) all duly naturalized citizens; (2½) or a male child of naturalized citizen who had reached the age of twenty-one years; or (3) all citizens who prior to January 1, 1868, were entitled to vote in the State of Maryland, or any other State of the United States, at a State election, and the lawful male descendants of any such person, was void as being contrary to and forbidden by the Fifteenth Amendment of the Constitution of the United States and the laws properly enacted for the enforcement of said amendment, was equivalent to an averment that said Annapolis Registration Law was altogether void and unconstitutional, inasmuch as the part of said law thus alleged to be unconstitutional was not separable from the balance of the law; and because that portion of the law thus declared unconstitutional constituted practically the only respect in which said law changed the pre-existing law regulating the right of registration and suffrage in Annapolis, wherefore the Legislature of Maryland would never have enacted said Registration Law without the part thus claimed and alleged to be void. Wherefore the demurrer should have been sustained on ground 4 (Record, page 4. *Giles vs. Harris*, 189 U. S., 475).

(3) In failing to rule that these cases are controlled by the ruling of this Court, in the case of *Giles vs. Harris*,

189 U. S., and *Giles vs. Teasley*, 193 U. S., 160, and, therefore, sustaining the demurrer.

(4) In not holding that even if the Fifteenth Amendment must be deemed to have the effect of striking out of the Annapolis Registration Law the so-called "Grandfathers Clause"—Class 3 of Sec. 4—and even though the balance of the Act should be deemed to be valid without the clause, still the plaintiffs could not recover, because it is admitted that they would still be disqualified under the valid part of the Act, not having the requisite assessment of \$500.00 worth of property, or being naturalized citizens or children of naturalized citizens.

(5) In refusing the defendant's second prayer (Record, page 28) to the effect that there was no evidence in the case legally sufficient to show that the defendants failed to register plaintiffs on account of their race, color or previous condition of servitude.

(6) In refusing the defendants' third prayer as to the validity of the Annapolis Registration Law (Record, page 28).

(7) In failing to rule that the defendants, being officers of registration charged with duties of a judicial nature and acting in obedience to a statute of the State of Maryland which had never been adjudged to be unconstitutional or void by any Court, and under which they were subject to criminal penalties in case they registered the plaintiffs, were not liable in an action of this kind without proof that they acted in bad faith, or maliciously, in refusing to register the plaintiffs.

(8) In failing to rule that registration officers, acting in good faith under such an Act as the Annapolis Registration Law, said Act never having been declared unconstitutional or void by any Court, cannot be held liable in any way, inasmuch as the inhibition contained in the Fifteenth Amendment against denying or abridging the right of a citizen of the United States to vote, is directed at the

State itself and not at the individual, and Congress is given power, under Section 2 of said amendment, by appropriate legislation to compel a State by any means Congress pleases, such as abolition of its representation in Congress, to obey said inhibition, and, therefore, any legislation on the part of Congress which would subject State officials, such as registration officers, acting in good faith, to penalties, civil or criminal, for acting in obedience to the laws of their State which had never been adjudged to be invalid or unconstitutional, would not be legislation "*appropriate*" for the enforcement of said Fifteenth Amendment, because not *necessary*, and because the enforcement of such legislation against State officials under such circumstances would endanger the autonomy of the State by embarrassing its governmental functions and be in conflict with the main purpose of the people in adopting a Constitution of the United States which was to create a perpetual union of indestructible States, each State constituting always a political entity completely sovereign within its proper sphere.

(9) In refusing to rule, as requested in division second of defendants' fourth prayer (Record, page 29), that the Annapolis Registration Law did not authorize the defendants to refuse to register the plaintiffs on account of their race, color or previous condition of servitude.

(10) In refusing to rule and adjudge that Section 1979 of the United States Revised Statutes, upon which these suits were brought, does not give any right of action in cases of this kind different from such as would exist at common law.

(11) In failing and refusing to rule that the acts complained of by the plaintiffs do not constitute a deprivation of any right, privilege or immunity secured by the Constitution and laws of the United States within the meaning of said Section 1979.

(12) In failing to rule that said Section 1979 has no application to the cases at bar, because it was passed

solely to protect civil rights guaranteed or secured under the Fourteenth Amendment.

(13) In failing to rule, as submitted as grounds 8 of defendants' demurrer (Record, page 11), that the inhibitions contained in the Fifteenth Amendment against the denial or abridgment of the right of a citizen of the United States to vote on account of race, color or previous condition of servitude, apply only to the right to vote which a citizen of the United States has by virtue of such citizenship; that is to say, to the right to vote which he derives from the United States, the same being the right to vote for members of Congress (and now for United States Senator), and that said inhibition does not in any way affect the right to vote at State or municipal elections conferred by the States upon any of its citizens.

(14) In failing to rule and decide that in any event the right of a citizen of the United States to vote, mentioned in the Fifteenth Amendment, does not include the right to vote in municipal elections of corporations created and existing solely by legislative will, but only to vote at elections of a public general character.

*in excess.*  
(15) In failing to rule and decide that if the Fifteenth Amendment should be construed to have reference to voting at State or municipal elections it would be itself void, because of the amending power conferred upon Congress and three-fourths of the State by Article 5 of the Constitution.

(16) In overruling defendants' demurrer.

(17) In granting plaintiffs' prayer and overruling defendants' special exception thereto.

The assignment of errors will be found on pages 31 to 34 of the Record.

### ARGUMENT.

With one exception the same defenses (more or less specifically) were taken by the defendants under their demurrer as were subsequently raised by the prayers submitted to the Court at the trial, and the ruling of the Court upon the demurrer raised the same questions as were subsequently involved in its rulings upon the prayers. The exception in question is that the ruling of the Court in granting the plaintiffs' first prayer and overruling the defendants' special exception thereto for lack of evidence, and the refusal of the defendants' first and second prayers.

By these the defendants set up a defense which was not available under the demurrer, and this defense will first be presented before going into those arising on the demurrer.

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### PLAINTIFFS' FIRST PRAYER AND DEFENDANTS' SPECIAL EXCEPTION, AND DEFENDANTS' FIRST AND SECOND PRAYERS.

It is submitted that the ruling of the Court on these prayers and the special exceptions was erroneous.

As already shown, the declaration made the following averment, and that averment constituted the gist of the plaintiffs' case, viz: "But the said defendants, wholly regardless of their said duties and obligations, etc., as such registers, as aforesaid, declined and refused to permit said plaintiffs to be so registered as such legal voters as aforesaid; and thus restricted and abridged the plaintiff's right of suffrage, which he had enjoyed for more than thirty years, avowedly, and only because the said plaintiff, *by reason of his race and color*, and for no other reason, was not entitled to vote in the State of his residence, to wit, the State of Maryland, prior to the first day of January, one thousand eight hundred and sixty-eight; and their refusal to register said plaintiff was

caused and occasioned by no other matter or thing whatsoever.

It will be observed that the averment is not that the defendants refused to register the plaintiff "because the plaintiff was not entitled to vote in Maryland prior to the first day of January, 1868." They realized that that averment would not have been sufficient to support their contention that the defendants had denied or abridged the plaintiff's right to vote because of his race, color or previous condition of servitude. *because he*

The averment is that the defendants refused to register the plaintiff, "*by reason of his race and color*," was not entitled to vote in Maryland prior to January, 1868. This is equivalent to charging that the defendants would not have registered the plaintiff if the latter's inability or incapacity to vote prior to January, 1868, had been due to some other cause than color, such as the fact that he had not been registered, or to the fact that he was disqualified by reason of his conviction of crime, or to the fact that he was not twenty-one years of age at that time. But no evidence was produced on the part of the plaintiff to sustain any such allegation.

On the contrary, it is expressly admitted, as already stated, that "the two defendants refused to register the plaintiffs solely because they did not come within the enumerated classes mentioned in Section 4 of the Act of the General Assembly of Maryland, 1906, Chapter 525." In other words, solely because he was not assessed for \$500 worth of property (1), or (2) a naturalized, or (2½) the child of a naturalized citizen, or (3) a man who prior to January 1, 1868, was entitled to vote in the State of Maryland, or any other State, at a State election, *for any reason whatever*," because that is what the Statute says: No matter what may have been the reason for his lack of the right to vote prior to January 1, 1868, whether it was his lack of age, his not being registered, his conviction of crime, or his color, or any disqualifying cause, the fact of his incapacity at that time, and *that fact alone*,

was what kept him from coming under Clause 3 of the Acts of 1908; and the admission is that *that* was the *sole* reason which the defendants had for refusing to register him.

It is respectfully submitted, therefore, that the admission does not support this allegation of the declaration, and therefore the Court erred in refusing to sustain the defendants' special exception and in refusing to grant the defendants' first and second prayers.

It may be remarked also that in making this admission the plaintiffs only admitted what could not possibly have been denied. If the section under which the registration officer is acting says in so many words, "You shall not register any man who does not come within certain specific classes," there is no reason why these officers should give any consideration to the question as to *why* the man does not come within any particular class.

The fact that he does not come within that class is all that they have any occasion to consider, and in all human probability it is all that they ever do consider.

It may be argued, although we think not successfully, that the State of Maryland, in enacting this law, may have intended to abridge or deny the right of suffrage of such negroes as did not possess property, etc., because of their race or color or previous condition of servitude.

But this is not a suit against the State of Maryland.

The question is not what the State of Maryland may have done or intended by enacting the law in question, but what the defendants have done. Had they, as alleged in the declaration, deprived these plaintiffs of the right to be registered, and thereby deprived them of the right to vote, because of their race, color, etc., or for some other cause? If for some other cause, it makes no difference how unreasonable or how absurd the cause may be, the defendants are not guilty as charged and the plaintiffs have not made out their case.

"It is apparent that the thing complained of, so far as it involves rights secured under the Federal Constitution, is the action of the State of Alabama in the adoption and enforcing of the Constitution with the purpose of excluding from the exercise from the right of suffrage of the negro voters of the State in violation of the Fifteenth Amendment of the Constitution of the United States. *The great difficulty of reaching political action of a State through remedies afforded in the Courts* was suggested by this Court in *Giles vs. Harris*, supra.

*Giles vs. Teasley*, 193 U. S., 166.

But, assuming the case not to be disposed of upon the above contention, we respectfully submit the following propositions in support of the demurrer:

#### PROPOSITIONS:

I. THAT THE DECLARATIONS FILED IN THESE CASES ARE INSUFFICIENT BECAUSE THEY FAIL TO ALLEGE THAT THE ACTION OF THE DEFENDANTS IN REFUSING TO REGISTER THE PLAINTIFFS WAS WILFUL OR MALICIOUS.

II. THE ALLEGATIONS CONTAINED IN THE DECLARATIONS IN THESE CASES DO NOT SHOW A CASE WHERE THE STATE OF MARYLAND OR ANY PERSON ACTING UNDER ITS AUTHORITY HAS DENIED OR ABRIDGED THE RIGHT OF THE PLAINTIFFS TO VOTE ON ACCOUNT OF RACE, COLOR OR PREVIOUS CONDITION OF SERVITUDE.

III. THAT THE INHIBITIONS CONTAINED IN THE FIFTEENTH AMENDMENT AGAINST THE DENIAL OR ABRIDGMENT OF "THE RIGHT OF CITIZENS OF THE UNITED STATES TO VOTE"

ON ACCOUNT OF RACE, COLOR OR PREVIOUS CONDITION OF SERVITUDE, IS BY THE PLAIN LANGUAGE OF THE AMENDMENT MADE TO APPLY ONLY TO THE RIGHT TO VOTE WHICH CITIZENS OF THE UNITED STATES HAVE BY VIRTUE OF SUCH CITIZENSHIP; THAT IS, THE RIGHT TO VOTE DERIVED FROM THE UNITED STATES, AND THAT THE INHIBITION THEREIN CONTAINED DOES NOT APPLY TO OR IN ANY WAY AFFECT THE RIGHT TO VOTE IN STATE OR MUNICIPAL ELECTIONS CONFERRED BY A STATE UPON ANY OF ITS CITIZENS.

IV. THAT ALLOWING THE BROADEST POSSIBLE CONSTRUCTION, THE RIGHT OF CITIZENS OF THE UNITED STATES TO VOTE MENTIONED IN THE FIFTEENTH AMENDMENT, WHICH THE STATES ARE THEREBY PROHIBITED FROM DENYING OR ABRIDGING ON ACCOUNT OF RACE, COLOR OR PREVIOUS CONDITION OF SERVITUDE, IS THE RIGHT TO VOTE AT ELECTIONS OF A PUBLIC GENERAL CHARACTER, AND DOES NOT INCLUDE THE RIGHT TO VOTE IN CORPORATE BODIES CREATED SOLELY BY LEGISLATIVE WILL AND WHEREIN SUCH RIGHT IS DEPENDENT ALTOGETHER UPON LEGISLATIVE DISCRETION, AS IN MUNICIPAL CORPORATIONS.

V. IF CONSTRUED TO HAVE REFERENCE TO VOTING AT STATE OR MUNICIPAL ELECTIONS, THE FIFTEENTH AMENDMENT WOULD BE BEYOND THE AMENDING POWER CONFERRED UPON THREE-FOURTHS OF THE STATES BY ARTICLE V OF THE CONSTITUTION, AND THEREFORE THE AMENDMENT SHOULD NOT RECEIVE

THAT CONSTRUCTION, IF IT IS FAIRLY OPEN TO A MORE LIMITED CONSTRUCTION.

# I.

THAT THE DECLARATIONS FILED IN THESE CASES ARE INSUFFICIENT BECAUSE THEY FAIL TO ALLEGE THAT THE ACTION OF THE DEFENDANTS IN REFUSING TO REGISTER THE PLAINTIFFS WAS WILFUL OR MALICIOUS.

The essential allegation of the declarations in these cases is that the defendants, acting as registration officers, in the City of Annapolis, for the reasons alleged, refused to register the plaintiffs. The declarations conclude with the following averment:

"Whereby, to wit, by such wrongful, illegal and oppressive refusal and declination on the part of said defendants as such registers as aforesaid, to place the name of the plaintiff on the registration list of voters entitled to vote at municipal elections in the City of Annapolis, the plaintiff has been and is, under color of an alleged statute of a State, to wit, of said Act of the Assembly of the said State of Maryland, subjected and caused to be subjected to the deprivation of a right, privilege and immunity secured to him, the said plaintiff, by the Constitution and laws, namely, of the privilege and immunity to have his right to vote at elections as entitled as such citizen in a city, a municipality and a territorial sub-division of a State, to wit, of the State of Maryland, permitted and allowed without distraction or discrimination against him by reason of race or color on his part."

If it be contended by the plaintiffs that *apart from any particular statute* covering the subject matter of these suits, they are maintainable in this Court, under the general jurisdiction conferred upon it by the several Acts of Congress, over cases arising under the Constitution and laws of the United States, then we apprehend

that it will not be denied that under the authorities, it is necessary for the plaintiffs to specifically allege that the acts of the defendants complained of were done wilfully and maliciously, or corruptly.

The acts of defendants complained of in the cases at bar were acts done by them in their official capacity as officers of registration under the laws of Maryland. It is not charged that they did anything other than what they were required and *compelled* to do under the law. Their acts, therefore, were not and could not have been wilful or malicious.

To hold them liable in an action at law for damages for anything done in the honest discharge of their official duty, and for acts *they were compelled to do under severe penalties, by the very law under which they were appointed*, would be a departure, we submit, from any known principle of law.

Let us see where such a principle would lead. The plaintiffs alleged that this registration law in so far as it prevented them from registering is void, because in conflict with the Fifteenth Amendment. The defendants upon the other hand believed it was valid when the plaintiffs presented themselves for registration, and still so believe. The Legislature of Maryland believed it was valid when it was enacted. All the presumptions are in favor of its validity. No Court has ever said otherwise. Yet the plaintiffs contend that the defendants in enforcing this statute, acted at their peril and are to be mulcted in damages if they should happen to have been mistaken. No such rule, we are sure, will ever be enforced by this Court. These remarks are, of course, limited to the cases at bar, which are actions at law brought against the defendants personally for official acts, wherein there is no denial that such acts were done honestly and in good faith.

In a note in 11 L. R. A. N. S., 501, to the very recent case of *Blake vs. Brothers*, 79 Conn., 676, will be found

a thorough review of all the cases upon this question. As a result of an examination of all the cases, the law is thus stated:

“It is a well-established principle of law, in both America and England, that no action is maintainable against officers of election for refusing to receive a vote, if they have been guilty of no malice or fraud, and have exercised their best judgment, though a legally qualified voter is thereby deprived of his right to vote. All the decisions supporting this principle, in which there is any discussion of the question, are placed upon the ground that, in passing upon the qualifications of a person offering to vote, election officers act judicially, and are not infrequently called upon to determine legal questions of great difficulty; and that to hold them personally responsible in damages for a mere error in judgment, even though a citizen may have been deprived thereby of his rightful vote, would be not only unjust in principle, but unwise in policy, for the inevitable result would be to turn honest and capable men from accepting an office attended with such hazard. So similar is the reasoning of these cases that it will be necessary to do more than to cite them together with those decisions which assert the principle without discussion.” The following cases are then cited:

Murray vs. Ramsey, 114 U. S., 15;  
 Isaacs vs. McNeal, 44 Fed., 32;  
 Alden vs. Hinton, 6 D. C., 217;  
 Bernier vs. Russell, 89 Ill., 60;  
 Carter vs. Harrison, 5 Blackf., 138;  
 Culfield vs. Bullock, 1 B. Mon., 494;  
 Morgan vs. Dudley, 18 B. Mon., 693;  
 Chrisman vs. Bruse, 1 Duv., 63;  
 Miller vs. Rucker, 1 Bush., 135;  
 Bridge vs. Oakey, 12 Rob. (La.), 638;  
 Bridge vs. Oakey, 2 La. Ann., 968;  
 Dwight vs. Rice, 5 La. Ann., 580;

Patterson vs. D'Auterive, 6 La. Ann., 467;  
 Brevard vs. Hoffman, 18 Md., 479;  
 Anderson vs. Baker, 23 Md., 531;  
 Elbin vs. Wilson, 33 Md., 135;  
 Friend vs. Hamill, 34 Md., 298;  
 Gordan vs. Farrar, 2 Dougl. (Mch.), 411;  
 Curry vs. Cabliss, 37 Mo., 330;  
 Blair vs. Ridgley, 41 Mo., 63;  
 Pike vs. Megoun, 44 Mo., 491;  
 Wheeler vs. Patterson, 1 N. H., 88;  
 Hanlon vs. Partridge, 69 N. H., 88;  
 Jenkins vs. Waldron, 11 Johns, 114;  
 Peavey vs. Robbins, 48 N. C., 339;  
 Weckerly vs. Geyer, 11 Serge. & R., 35;  
 Moran vs. Rennard, 3 Brewst. (Pa.), 601;  
 Keenan vs. Cook, 12 R. I., 52;  
 Rail vs. Potts, 8 Humph., 225;  
 Ashby vs. White, 1 Bro. P. C., 62, reversing;  
 2 Ld. Raym., 938, 6 Mod. 45, 1 Salk., 19;  
 1 Smith's Leading Cases, 9th ed., 472;  
 Cullen vs. Morris, 2 Starkie, 577;  
 Tozer vs. Child, 7 El. & Bl., 377.

Whatever dissent there has been from the proposition announced above seems to have been mainly based upon a misconception of the case of *Ashby vs. White*, 1 Bro. P. C., 62, 2 Ld. Raym., 938, the earliest case in which this question arose.

"In that case, the plaintiff alleged that the defendant maliciously and fraudulently rejected his vote, and the jury found the defendants guilty upon that issue. Judgment was arrested in the King's Bench by three judges against Lord Holt, but, upon error on the House of Lords, judgment was finally entered for the plaintiff. As reported, there is nothing to show upon what the House of Lords based its decision; and in the report of the case

in the King's Bench, none of the judges referred to the question of malice, and the language of Lord Holt, whose views prevailed in the House of Lords, seem to indicate that he thought the action was maintainable, even in the absence of malice. But History records that, in the resolutions adopted by the House of Lords in answer to the resolutions of the House of Commons reprehending the bringing of the action and the judgment thereon, it was distinctly stated that the plaintiff recovered because his vote was maliciously rejected, and that Lord Holt afterwards published a revision of his opinion at King's Bench, in which he held that the gist of the action was malice. And, of course, the record before the House of Lords on the writ of error was conclusive that malice was established." 11 L. R. A. N. S., 502.—70 Com. 676.

It was upon the mistaken view that *Ashby vs. White* decided that malice was not necessary to be proved in order to recover for the illegal rejection of a vote that the first case ever announcing such a view explicitly was based. This was the case of *Lincoln vs. Hapgood*, 11 Mass., 350. The Massachusetts' cases have adhered to this view. It has also been followed in Ohio and Wisconsin.

*Jeffries vs. Aukney*, 11 Ohio;  
*Gillespie vs. Palmer*, 20 Wis., 544;  
 See also *Osgood vs. Bradley*, 7 Me., 411;  
*Pierce vs. Getchell*, 76 Me., 216;  
*Long vs. Long*, 57 Iowa, 497.

It will therefore appear that the cases holding the view that there can be a recovery for the refusal to receive a legal ballot even in the absence of malice, are not only contrary to the great weight of authority, but are based upon a clear misconception of what was decided in *Ashby vs. White*.

It is clear from the cases that the mere fact that the vote rejected may have been a legal vote makes no difference. So that even though the plaintiffs might have been

entitled to register at the time in question, and the refusal of the defendants was not justified by law, still there can be no recovery in these cases against defendants unless their action were malicious or corrupt.

It can make no possible difference so far as these cases are concerned, by what law the plaintiffs claim the right to register, whether it be under the State or the Federal law. An honest mistake in interpreting one is exactly the same as an honest mistake in interpreting the other. The following quotations will illustrate this proposition:

In *Dwight vs. Rice*, 5 La. Ann. 580, plaintiff presented himself to vote in November, 1848, at an election of Presidential electors. A section of the new Constitution of Louisiana provided that those who engaged in dueling or who had challenged anyone to a duel, should not be allowed to vote, and the Act of June 1, 1846, provided that an oath to this effect must be taken. Plaintiff's right to vote was challenged on the ground that he had sent a challenge to fight a duel since the new Constitution was adopted and he declined to take the oath prescribed by the Act.

The Court said (page 580):

"He sues the Commissioners of Election for damages on the ground that the Twelfth and Thirteenth Sections of the Act 'for the Uniform Regulation of Elections in the State of Louisiana' are unconstitutional, and therefore inoperative, null and void. There is no doubt, for the contrary is not suggested, that the Commissioners of Elections honestly and truly believed these sections of the law constitutional and valid. They are not, therefore, liable for carrying the law into effect, even if subsequent investigations should lead to the decision that the law is unconstitutional. The condition of a public officer would be hard, indeed, if, while he followed the very dictate of a statute, believing it to be constitutional, and which had not been the subject of judicial investigation and decision, he should be condemned to pay damages

for so doing, even if the statute should be subsequently considered unconstitutional by the judiciary. Laws are the will of the people expressed through their legislative representatives. Now we find no statute or article of the Code to the effect that damages should be inflicted under the circumstances of the present case. We have then to ask ourselves, in the absence of express law, what equitably is the will of the people in such a case? The best means of ascertaining it is to ask ourselves if the General Assembly would enact a law to impose damages on the Commissioners of Elections under such circumstances. And the response in every man's bosom must be, that the Legislature would not, if it were proposed, enact a law inflicting damages upon the Commissioners of Elections for carrying into effect an expressed statute which they believed to be constitutional even though it should be subsequently decided that the law was unconstitutional."

(The Court held, however, in this case that the law was constitutional and plaintiff's vote rightly refused.)

The same doctrine was announced in *Jenkins vs. Waldron*, 11 Johns, 114 (N. Y.):

"It would, in our opinion, be opposed to all the principles of law, justice and sound policy, to hold that officers called upon to exercise their deliberative judgments are answerable for a mistake in law, either civilly or criminally, when their motives are pure and untainted with fraud or malice."

See also *Goetchens vs. Matthewson*, 5 Lans., 214 (N. Y.), where it was held that election officers were not liable for refusing the vote of a deserter, under an Act of Congress, though it was later held that this Act only applied to those who were duly convicted of desertion, and as a matter of fact, the man was qualified to vote.

Finally, we call attention to the fact that the contention here made is supported by the Federal Decisions.

Murray vs. Ramsey, 114 U. S., 15;

Isaacs vs. McNeil, 44 Fed., 32;

See also Wiley vs. Sinkler, 179 U. S., 58;

Swafford vs. Templeton, 185 U. S., 491.

It would seem, however, from the language of the declarations that it is not plaintiff's idea to rely upon the general jurisdiction of this Court, but to attempt to show that the cases are within some particular statute giving a cause of action for the matters complained of.

The only statute which it can now be argued is in effect and which, we believe, by any possibility could be relied upon by the plaintiffs as giving specifically such a right of action is Section 1979 of the Revised Statutes of the United States. This statute is as follows:

"Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

With regard to this section of the Revised Statutes of the United States the defendants contend:

*I. That it creates no new right of action of a specific character, and does not in the least dispense with the necessity of an averment of wilfulness or malice in cases such as those now before the Court.*

*II. That it has no application to the cases at bar because it was passed solely to protect the CIVIL RIGHTS guaranteed or secured under the Fourteenth Amendment.*

*III. That in any event, the acts complained of by plaintiffs do not constitute a deprivation of any right, privi-*

*lege or immunity secured by the Constitution and laws of the United States within the meaning of the statute.*

*I. That it creates no new right of action of a specific character and does not in the least dispense with the necessity of an averment or wilfulness or malice in cases such as those now before the Court.* The soundness of first contention above set forth, it would seem from the authorities, is no longer open to dispute. The uniform construction which has been placed upon Section 1979 of the Revised Statutes is to the effect that it was not its purpose to create a new and specific cause of action as a remedy for the acts mentioned therein, but amounted to nothing more than a declaration with regard to the jurisdiction already possessed by the Federal Courts.

It may serve to explain the real meaning of this section as it now reads, to show through what stages it has passed before reaching its present shape in the Revised Statutes.

The first section of the Act of April 20th, 1871, Ch. 22, 17 St. L., 13, provided:

“That any person, who under color of any law, statute, ordinance, regulation, custom or usage of any State, shall subject or cause to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity or other proper proceeding for redress; such proceeding to be prosecuted in the several District or Circuit Courts of the United States, with and subject to the same rights of repeal, review upon error, and other remedies provided in like cases in such Courts, under the provisions of the Act of the ninth of April, eighteen hundred and sixty-six, entitled ‘An Act to Protect All Persons in the United States in Their Civil Rights, and to Furnish

the Means of Their Vindication;' and the other remedial laws of the United States which are in their nature applicable to such cases."

In the case of *Hemsly vs. Myers*, 45 Fed. Rep., 290, Caldwell J., gives the following clear exposition of the meaning of this statute:

"The provision in the section (1979) as originally enacted, conferring jurisdiction on the District and the Circuit Courts of the causes of action enumerated in the section, has been transferred to the head of jurisdiction of those Courts respectively. The section does not repeal, limit, or restrict the previously existing rules affecting the relations of the State and the United States Courts, nor does it abolish the distinction between law and equity *or change the rules of pleading or mode of proceeding* in any respect. If the section was stricken out of the statute, the rights, privileges and immunities of the citizens under the Constitution and laws would remain to them, rights would be the same that it is now. The section declares that the mode of proceeding to obtain redress for a deprivation and the mode of seeking redress for a deprivation of these rights shall be by 'an action at law, or a suit in equity of other proper proceeding for redress.' If the case is one which under the well-understood rules of pleadings is cognizable only at law, then an action at law is the proper proceeding for redress; 'and if it is one cognizable only in equity, then a suit in equity is the proper proceeding for redress.' *No new mode of proceedings is enacted and no new right created by this section.* As it now stands in the Revised Statutes it may be properly denominated a '*declaratory statute.*'" (Italics ours.)

The above language was quoted with approval in the case of *Aultman & Taylor Company vs. Brumfield*, 102 Fed., p. 13, where the opinion was delivered by Lurton, Circuit Judge, and concurred in by Ricks, District Judge.

It would hardly seem to be an arguable proposition

from the language of Section 1979 itself, that it was intended to give any new form of action or in any way dispense with the usual and necessary averments in the ordinary actions at law and equity. If the statute had merely said that for the deprivation of a right secured under the Constitution and laws of the United States, in the manner therein set forth, the party injured should be entitled to bring an action at law, and had stopped there, then some support could be found for the contention that a right of action was thereby expressly created. But when the statute proceeds and uses the language "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress" it becomes obvious that no specific remedy was being provided and that none of the rules of pleading in either equitable or legal actions was being changed. The statute left the forms of action as it found them, and there is no basis for the contention that any allegation necessary under the general rules of law in order to sustain such actions as those now before the Court is rendered unnecessary by anything contained in section 1979.

This identical question has been flatly decided by the Supreme Court of the United States in the case of *Giles vs. Harris*, 189 U. S., 475.

In that case a bill in equity was brought by a colored man on behalf of himself and on behalf of more than five thousand negroes, citizens of the County of Montgomery, Alabama, similarly situated and circumstanced as himself, against the Board of Registry of said county.

The bill alleged that the defendant acting under certain sections of the Constitution of Alabama had refused to register the plaintiff as a voter, and had done so arbitrarily on the ground of his color. The prayer of the bill in substance that the defendants be required to enroll upon the voting lists the name of the plaintiff and of all qualified members of his race who applied before a time specified.

The plaintiff's contention was that he had been deprived by persons acting under color of the Constitution of the State of Alabama of right secured to him by the Constitution of the United States, namely, the right to be registered as a qualified voter of Montgomery County, in said State, without discrimination on account of race. This right he claimed was secured to him by the Fifteenth Amendment to the Constitution of the United States.

He further contended that under Section 1979 of the Revised Statutes he was expressly given the right to maintain a suit in equity upon the matters set forth in his bill.

In dealing with this contention the Court said:

"It seems to us impossible to grant the equitable relief which is asked. It will be observed in the first place that the language of section 1979 does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject-matter for that kind of relief. The words are 'shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.' They allow a suit in equity *only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding*. The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. *Green vs. Mills*, 63 Fed. Rep., 852." (Italics ours.)

It will be seen that although the statute uses the term "suit in equity" the Court refuses to entertain a bill in the above cases, because under "existing standards" its subject-matter—a political wrong—was not within the traditional limits of proceedings in equity. The form of action the plaintiffs are here seeking to take advantage of is one of the long established common law actions, having well defined limits. It is essential in order to maintain it for the deprivation of the right to vote, that malice be alleged. It can be used only in such cases. It is as

much beyond the traditional limits of this form of action to attempt to use it for the deprivation of the right to vote without an averment of malice, as it is beyond the scope of equitable remedies to attempt to use them to redress political wrongs. If the "existing standards" are not changed in the one case they cannot be in the other.

Before concluding on this head, we beg to call the Court's attention to the point that we are not making *here* any contention that Congress *might not*, if it had chosen so to do, have provided for liability in damages on the part of the Election Officials in a case of this sort without proof of malice or corrupt motive.

Our contention is confined to the proposition that in this statute (1979) Congress has not done so.

It may be conceded, for the sake of the argument, that an Act expressly providing for such liability in a civil suit would have been appropriate legislation for the enforcement of the Fifteenth Amendment.

Our only contention is that Section 1979 is not such an Act.

But the truth is, that Section 1979 was not enacted for the purpose of enforcing the Fifteenth Amendment at all, as will appear under the next head.

2. *That it has no application to the cases at bar, because it was passed to protect the civil right guaranteed or secured under the Fourteenth Amendment.* This contention with regard to the applicability of Section 1979 of the Revised Statutes to the cases now before the Court is supported by an express decision of this Court.

In the case of *Holt vs. Indiana Mfg. Co.*, 176 U. S., 68, suit was brought in the Circuit Court of the United States for the District of Indiana by the Indiana Mfg. Co., a corporation organized and existing under the laws of the State of Indiana, against Holt and others, taxing officers of Marion County, Indiana, and of a township in said county,

and others, constituting the Board of Review of that County, all of whom were citizens of Indiana, to enjoin the collection of certain personal taxes for the years 1892, 1893, 1894 and 1895, assessed upon the tangible property and capital stock of the company. The bill alleged that the larger part of the assessment made by the taxing authorities was for the supposed value of certain rights under letters of patent from the United States owned by the company and which the company insisted were not subject to taxation by the State authorities; that the capital stock, aside from tangible property, represented solely the supposed value of the letters patent; and that the taxes in respect of the tangible property had been paid by the company. Complainant charged that the assesement was illegal, unconstitutional and void, and averred that the suit was instituted to redress the deprivation, under color of a law of the State of Indiana, of a right secured by the law of the United States, and further, that it was a suit arising under the patent laws of the United States.

The Circuit Court entertained the suit and entered a decree in accordance with the bill, perpetually enjoining the collection of the taxes claimed to be due in respect of the capital stock in so far as the value thereof was derived from patent rights or letters patent owned by complainant.

Upon appeal to the Supreme Court it was held with regard to Section 1979 of the Revised Statutes that the same did not apply to the subject-matter of the bill. Mr. Chief Justice Fuller, in delivering the opinion of the Court, said:

“The sixteenth clause of Section 629 reads thus: ‘Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State, of any right, privilege or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of the citizens of the United States, or of all persons within the jurisdiction of the United States.’

"Similar jurisdiction is conferred upon District Courts by the twelfth clause of Section 563 of the Revised Statutes.

"Section 1979 of the Revised Statutes provides: 'Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.'

"All these provisions were brought forward from the Act of April 20th, 1871, entitled 'An Act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes, 17 Stat., 13, c., 22.

"Assuming that they are still in force, it is sufficient to say that they refer to *civil* rights only and are inapplicable here.

"If State legislation impairs the obligation of a contract, or deprives of property without due process of law, or denies the equal protection of the laws, as asserted by counsel in respect of the Statutes of Indiana, remedies are found in the first section of the Act of August 13th, 1888, 25 Stat., 433, c., 866, giving to the Circuit Courts jurisdiction of all cases arising under the Constitution and laws of the United States; and in Section 709 of the Revised Statutes, which gives a review on writ of error to the judgments of the State Courts whenever they sustain the validity of a State statute, or of an authority exercised under a State, alleged to be repugnant to the Constitution or laws of the United States. *Carter vs. Greenhow*, 114 U. S., 317; *Pleasants vs. Greenhow*, 114 U. S., 323," pages 72 and 73.

The opinion then proceeds to dispose of the question as to whether jurisdiction can be maintained under the stat-

ute last referred to, and decides that as the requisite amount of two thousand dollars was not involved, jurisdiction over the suit could not obtain.

The Court therefore expressly decided that although the right which the complainant claimed it has been deprived of under color of a State law, was based upon the Constitution and laws of the United States, still no suit could be founded in Section 1979 of the Revised Statutes because that section was passed to protect the rights secured by the Fourteenth Amendment and therefore only covered civil rights.

In a very recent case decided by Circuit Judge Morrow, the same view was expressed.

"The rights, privileges and immunities which the Fourteenth Amendment to the Constitution of the United States guarantees and to which this section (1979) of the Revised Statutes was designed to protect were rights, privileges and immunities which belong to citizens of the United States, as such, but not the rights, privileges and immunities which belong to citizens of the State. There are privileges and immunities belonging to citizens of the United States in that relation and character, and it is these, and these alone, that a State is forbidden to abridge." *Wadleigh vs. Newhall*, 136 Fed., 946.

We also call attention again to the title of the Act of April 20th, 1871, from which 1979 is taken, which was:

"An Act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States and for other purposes."

17 Stat. 13, c. 22.

The right attempted to be set up by plaintiffs is clearly, if a right at all, a *political* right.

*Giles vs. Harris*, 189 U. S., 475.

3. *That in any event the acts complained of by plaintiffs do not constitute a deprivation of any right, privi-*

*lege or immunity secured by the Constitution and laws of the United States within the meaning of the statute.* The inquiry presented by this proposition is whether the right set up in the declarations in these cases is a right, privilege or immunity "secured by the Constitution and laws" of the United States with the meaning of Section 1979 of the Revised Statutes.

Essentially and ultimately the declaration counts upon the deprivation of the right to vote at a municipal election. Whatever claim may be made upon the basis of the proposition that the Fifteenth Amendment secures the right not to be discriminated against, it cannot be contended by plaintiffs that this right itself is separable from the right to vote which they claim they have been deprived of.

Now, what right to vote the plaintiffs have, they can get, so far as this case is concerned, from the State of Maryland alone. It can come from no other source.

*Minor vs. Happersett, 21 Wall., 162.*

It will no doubt be contended that it is not the right to vote that forms the basis of these actions, but the right not to be discriminated against on account of race, color or previous condition of servitude, and that this is a right secured by the Constitution of the United States. Granting at present, for the sake of the argument, that this is true, yet it has been distinctly decided that *a right of such a character is not within the purview of Section 1979.*

In the case of *Carter vs. Greenhow*, 114 U. S., 317, an action of trespass on the case was brought by Carter, the plaintiff therein, against Greenhow, the defendant, claiming that the latter had refused as Treasurer of the city of Richmond, acting under a statute of the State of Virginia, to receive in payment of taxes certain coupons of said State, which by contract with it were to be receivable in payment of said taxes.

The suit was sought to be maintained under Section

1979 of the Revised Statutes, the plaintiff claiming that as by contract with the State of Virginia he was entitled to have his coupons received in payment of the taxes in question, no law of the State of Virginia could take this right away from him, because such law would be in violation of the clause of the Constitution of the United States forbidding any State from impairing the obligation of a contract. As the defendant had acted under this State law in refusing to receive the coupons in payment of taxes, the plaintiff claimed that his right to have his contract with the State of Virginia remain free from impairment secured to him by the Constitution of the United States had been taken from him under the color of a State law within the meaning of the statute in question.

With regard to this contention of the plaintiff, the Court said:

“The question presented in this record is, whether the facts stated in the plaintiff’s declaration constitute a cause of action within the terms of Section 1979, Rev. Stat., that is, whether he shows himself, within its meaning, to have been subjected by the defendant, under color of a statute of a State, to the deprivation of a right, privilege or immunity secured by the Constitution.

“The acts charged against the defendant are, that he refused to receive from the plaintiff the coupons tendered in payment of taxes, and thereafter proceeded to levy upon and take his property for the purpose of collecting such taxes in money. The rights alleged to be violated are the right to pay taxes in coupons instead of money, and, after a tender of coupons, the immunity from proceeding to collect such taxes as though they were delinquent. These rights the plaintiff derives from the contract with the State, contained in the Act of March 28th, 1879, and the bonds and coupons issued under its authority.

“How and in what sense are these rights secured to him by the Constitution of the United States? The an-

swer is, by that provision, Art. 1, Sec. 10, which forbids any State to pass laws impairing the obligations of contracts. That constitutional provision, so far as it can be said to confer upon, or secure to, any person, any individual rights, does so *only indirectly and incidentally*. It forbids the passage by the State of laws such as are described. If any such are nevertheless passed by the Legislature of a State, they are unconstitutional, null and void. In any judicial proceeding necessary to vindicate his rights under a contract, affected by such legislation, the individual has a right to have a judicial determination, declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution. But of this right the plaintiff does not show that he has been deprived. He has simply chosen not to resort to it. The right to pay his taxes in coupons, and the immunity from further proceedings in case of a rejected tender, are not rights directly secured to him by the Constitution, and only so indirectly as they happen in this case to be the rights of contract which he holds under the laws of Virginia. And the only mode in which that constitutional security takes effect is by judicial process to invalidate the unconstitutional legislation of the State, when it is set up against the enforcement of his rights under his contract. The mode in which Congress has legislated in aid of the rights secured by that clause of the Constitution, is, as is pointed out with clearness and fullness in the opinion of the Court in the Civil Rights Cases, 109 U. S., 3-12, by providing for a review on writ of error to the judgments of the State Courts, in cases where they have failed properly to give it effect, and by conferring jurisdiction upon the Circuit Courts by the Act of March 3, 1875, ch. 137, 18 Stat., 470, of all cases arising under the Constitution and laws of the United States, where the sum or value in dispute exceeds \$500. Congress has provided no other remedy for the enforcement of this right.

“It might be difficult to enumerate the several descrip-

tions of rights secured to individuals by the Constitution, the deprivation of which, by any person would subject the latter to an action for redress under Section 1979, Rev. Stat.; and, fortunately, it is not necessary to do so in this case. It is sufficient to say that the declaration now before us does not show a cause of action within its terms."

Pages 321-323.

We submit that the above case cannot be distinguished from those here. The right to vote without discrimination on account of race, color or previous condition of servitude, stands on the identical footing with the right to have a contract remain free from impairment by a State law.

The Supreme Court said in the case just cited that although the right to have a contract remain unimpaired by State laws was secured by the Constitution, its violation could not form the basis of an action, as in that case *the real basis of the action* was the refusal of the officer to receive the coupons in payment of taxes, which right to have them so received was not secured by the Constitution or laws of the United States.

This is the exact case here. The right to vote *at State or municipal* elections has its basis in State law and not in the Federal Constitution, and the Fifteenth Amendment bears exactly the same relation to this right to vote as the contract clause of the Federal Constitution does to the rights under the contract impaired. So that neither the right to vote nor the right under the contract being derived from the Federal Constitution, the denial or abridgment of the one nor the impairment of the other is within the class of cases contemplated by Section 1979 of the Revised Statutes, *that statute as interpreted by this Court only covering cases where the right of which a person has been deprived under color of a State law, is derived directly from the Constitution or laws of the United States.*

We have postponed until this time all reference to the case of *Brickhouse vs. Brooks*, 165 Fed. Rep., 534.

In that case Circuit Judge Goff held that an action against election officers could be maintained under Section 1979 of the Rev. Stat. for the wrongful rejection of a vote for a Member of Congress, under color of a State law, without any allegation of malice or wilfulness. In the opinion occurs, the following statement:

"The claim that, as the acts of the defendants are not alleged to have been wilful or malicious, the damages must, therefore, necessarily be colorable only and merely nominal, is without force in cases of this character. It was not necessary that the plaintiff should allege in his declaration that the defendants in rejecting his vote acted either maliciously or intentionally wrongful. The statute (Section 1979, Rev. Stat.) under which the plaintiff proceeded does not so require, and the rules of pleading applicable to common law suits, to which the defendants refer in the effort to sustain their demurrer, do not apply to this action.

"The Supreme Court in *Giles vs. Harris*, *Supra*, says: 'We have recognized, too, that the deprivation of a man's political and social rights properly may be alleged to involve damage to that amount capable of estimation in money' (the words 'that amount' referring to the sum of \$2000 necessary to give this Court jurisdiction)."

It is apparent from the opinion in the case that none of the points made by us in this brief were discussed or considered.

The learned judge while quoting from *Giles vs. Harris*, evidently did not consider the language which we have before quoted from the same case, to the effect that the rules of pleading were in no way changed by the statute referred to. Judge Goff says, "It was not necessary that the plaintiff should allege in his declaration that the defendants in rejecting his vote acted either maliciously or

intentionally wrongful. The statute under which the plaintiff proceeded does not so require, etc."

It is a sufficient answer to this to say that the statute does not say anything about the matter at all. Forms of action and rules of pleading are not referred to. An action for damages for refusing a vote is not mentioned. Where, then, are we to look to find what is a necessary allegation in any of the numerous actions which may be contemplated by this statute? Unquestionably to the common law. According to the reasoning of Judge Goff the Supreme Court would have had to entertain the bill in *Giles vs. Haris supra*. But we have seen that the Court in that case held that although "suit in equity" was specified in the statute it did not confer expressly jurisdiction to entertain a bill the subject-matter of which was by all ordinary standards not cognizable in equity. In this case the plaintiffs are trying to use the common law action for damages for the rejection of a vote, to cover a case not within the ordinary limits of that action—namely, a case where there is no malice or wilfulness alleged. The case cannot be distinguished from *Giles vs. Harris*.

Again the learned Judge who decided *Brickhouse vs. Brooks* evidently did not have his attention called to the case of *Holt vs. Mfg. Co., supra*, which expressly decided that Section 1979 of Rev. Stat. only covers *civil rights*.

*Brickhouse vs. Brooks* being an action for rejection of plaintiff's vote at a Federal election for members of Congress, plaintiff's right was founded on the Constitution. The right to vote for members of Congress is founded on the United States Constitution. *Wiley vs. Sinkler*, 179 U. S., 58; *Swafford vs. Templeton*, 185 U. S., 487. Hence there is certainly nothing in the *Brickhouse* case to militate against our contention that the right to vote at a municipal election within the States is founded on State law and that the Constitution of the United States comes into this case merely as an answer to the anticipated defence that the rejection was in pursuance of

the Act of 1908. It is well settled that it is not enough to give this Court original jurisdiction that the Constitution of the United States may afford an answer to an anticipated defence.

We submit that by the foregoing discussion of the three propositions laid down, we have shown that 1979, Rev. Stat., does not in the least affect these cases. This being so, the cases can only be sustained upon the general jurisdiction of this Court over cases arising under the Constitution and laws of the United States. We are therefore remitted to the original proposition submitted and already at length discussed, namely, that the declarations in these cases are defective, because there is no allegation that the acts of the defendants complained of were done with malice or corruption.

## II.

THE ALLEGATIONS CONTAINED IN THE DECLARATIONS IN THESE CASES DO NOT SHOW A CASE WHERE THE STATE OF MARYLAND OR ANY PERSON ACTING UNDER ITS AUTHORITY HAS DENIED OR ABRIDGED THE RIGHT OF THE PLAINTIFFS TO VOTE ON ACCOUNT OF RACE, COLOR OR PREVIOUS CONDITION OF SERVITUDE.

The inhibition of the Fifteenth Amendment against the denial or abridgment of the right to vote on account of race, color or previous condition of servitude is only directed against *State action*, and does not comprehend any acts of individuals whatsoever.

James vs. Bowman, 190 U. S., 122.

Plaintiffs aver that the defendants in refusing to register them, acted under color of a Maryland statute. It is therefore necessary to inquire, whether there is anything in the law under which defendants acted which au-

thorized any deprivation or abridgment of the plaintiff's right to vote on account of their race, color, etc.

The defendants were appointed and served as registration officers in the City of Annapolis, under the provisions of the Act of the General Assembly of Maryland of 1908, Chapter 525 (page 347). This Act is as follows:

“CHAPTER 525.

“An Act to fix the qualifications of voters at municipal elections in the City of Annapolis and to provide for the registration of said voters.

“Section 1. Be it enacted by the General Assembly of Maryland, That the Supervisors of Elections for Anne Arundel County be, and they are hereby authorized and directed, during the month of May, in the year nineteen hundred and nine, and in the same month every two years thereafter, to appoint three registers for the City of Annapolis for each ward of said city one from each of the two leading political parties of the State; said registers of voters shall receive the same compensation as registers of voters under the general laws of the State, and shall hold office for the term of two years until their successors are duly appointed and qualified. Said registers shall take the usual oath of office before the Supervisors of Elections.

“Sec. 2. And be it enacted, That said Supervisors of Elections shall procure and deliver to the registers of voters for each of the said wards two registration books similar in all respects to registration books now in use under the elections laws of Maryland, and all necessary blanks and stationery for conducting and having a complete registration of the voters of said city.

“Sec. 3. And be it enacted, That said registers for each of said wards shall open said registration books at the usual polling places in each of the wards of said city in the first and second Mondays and Tuesdays of June in

the year nineteen hundred and nine for a complete registration of the voters of said city who possess the qualifications required by this Act, and every two years thereafter, on the first Monday in May, said registers of voters shall open said books at the usual polling places in said wards for the revision of said lists of registration and for the registration of new voters possessing the qualifications presented by this Act. Said registers of voters shall give at least ten days' notice of the time and place of said registration, to be published in the newspapers doing the city printing and by hand-bills posted around the city.

“Sec. 4. Said registers of voters shall at said registration register all male citizens of the said city of Annapolis applying for registration of twenty-one years of age or over, who have resided therein one year preceding any municipal election, who have never been convicted of any infamous crime under the laws of the State of Maryland, and who shall come within any one of the three following classes of male citizens: 1. All taxpayers of the City of Annapolis assessed on the city books for at least five hundred dollars. 2. And duly naturalized citizens. 2½. And male children of naturalized citizens who have reached the age of twenty-one years. 3. All citizens who prior to January 1, 1868, were entitled to vote in the State of Maryland or any other State of the United States at a State election, and the lawful male descendants of any person who prior to January 1, 1868, was entitled to vote in this State or in any other State of the United States at a State election, and no person not coming within one of the three enumerated classes shall be registered as a legal voter of the City of Annapolis or qualified to vote at the municipal elections held therein, and any person so duly registered shall, while so registered, be qualified to vote at any municipal election held in said city; said registration shall in all other respects conform to the laws of the State of Maryland relating to and providing for registration in the State of Maryland.

"Sec. 5. Said books of registration shall at the close of each registration be turned over to the Supervisors of Elections for safe-keeping and shall be delivered to the judges of municipal elections in the City of Annapolis for the purpose of holding municipal elections therein and shall be the only books of registration for municipal elections in said city.

"Sec. 6. The cost of said registration shall be paid by the City of Annapolis.

"Sec. 7. Any register of voters under the provisions of this Act who shall knowingly violate the provisions of this Act shall be guilty of a misdemeanor and upon conviction shall be punished as provided in the general laws of this State relating to registration.

"Sec. 8. And be it enacted, That this Act shall take effect from the date of its passage."

The plaintiffs allege that in so far as Section 4 "affects or professes to affect the right to vote of any citizen of the United States by reason of his race, color or previous condition of servitude of any of his ancestors prior to the first day of January, one thousand eight hundred and sixty-eight, and being thus, as aforesaid, contrary to and forbidden by the supreme law of the land, the same was and is wholly invalid and void and of no effect in law, as affecting the rights of any citizen under and by virtue of Section 2 of Article VI. of the Constitution of the United States."

It appears to to the contention of the plaintiffs that the Act of 1908 is a valid existing law in all particulars as as to those provisions which they claim to be in violation of the Constitution of the United States.

We shall put aside for the moment the question whether any of the provisions of this Act are separable in the sense that any of them can stand if the particular one here attacked is held invalid as unconstitutional, and take up the question *whether there is any provision of the Act*

*that authorizes or permits any discrimination among the persons applying for registration thereunder, on account of race, color, etc.*

In addition to the qualifications of age, residence, etc., Section 4 of the Act of 1908, Ch. 525, provided that persons applying for registration as voters at any municipal election in the City of Annapolis shall come within one of the three following classes:

"1. All taxpayers of the City of Annapolis assessed on the city books for at least five hundred dollars.

2. And duly naturalized citizens.

2½. And male children of naturalized citizens who have reached the age of twenty-one years.

"3. All citizens who prior to January 1, 1868, were entitled to vote in the State of Maryland or any other State of the United States at a State election, and the lawful male descendants of any person who prior to January 1, 1868, was entitled to vote in this State or in any other State of the United States at a State election."

These provisions will be searched in vain for any reference to race, color or previous condition of servitude. No person is prohibited from registering on these grounds.

The plaintiffs in their declaration attempt to construct a theory to the effect, that because either they or their fathers were not entitled to vote in the State of Maryland prior to January 1, 1868, solely because of the word "white" in the Maryland Constitution, the qualification required by Class 3 in the 4th Section of the Act works a discrimination against them on account of their color.

That theory, we submit, entirely falls when the simple fact is stated that this provision of the Act has nothing to do with the ground on which persons prior to January 1, 1868, could not vote. It provides that every person who presents himself for registration must bring himself

within one of the classes, numbered 1, 2, 2½ and 3, and every person, whether white, black, red or yellow, who cannot qualify under classes 1, 2 or 2½ must show that either he or some person from whom he is descended was entitled to vote in one of the States of the Union prior to January 1, 1868. *If this cannot be shown, such person, whatever may be his color, cannot be registered. No matter for what reason the person applying or his ancestor may not have been entitled to vote in one of the States of the United States, if as a matter of fact he could not vote, the provision does not permit registration.*

It operates equally upon all persons of every color. It refers solely to the *fact* of whether the person applying for registration was entitled to vote prior to the time mentioned, or whether he is descended from someone who was then entitled. It takes no account of the ground upon which anyone was or was not so entitled.

If a white man applying to register under the Act cannot show that either he or someone from whom he is descended was entitled to vote prior to the time mentioned, he, of course, cannot register. Any disqualifications prior to January 1, 1868, are put upon exactly the same footing without the slightest discrimination.

The plaintiffs are asking that they be given a preference over all other persons attempting to register under this Act. They say that because they or their ancestors were not entitled to vote in Maryland prior to January 1, 1868, on account of their color and because they are colored men, the provision ought not to prevent them from registering, although it is clear that every other person who attempts to qualify under this provision must bring himself within the class mentioned therein.

What greater rights have the plaintiffs to ask that they be exempted from the operation of the provision than anybody else? If they cannot qualify under it, it is for the identical reason and no other that a white man or any other man cannot; namely, their inability to show that

either they or some person from whom they are descended were entitled to vote prior to the trial specified in the Act.

To say that because plaintiff or his ancestors would have been entitled to vote prior to 1868, except for his color, therefore a law discriminating against him on account of inability to vote prior to 1868 discriminates against him "on account of" his color is a patent fallacy. *It might as well be argued that the property qualification discriminates on account of previous condition of servitude, because if a man had not been held in bondage he would have been able to acquire some property. A slave could not acquire property any more than he could vote.*

A simple test to show that none of the clauses of the Annapolis law discriminates against negroes on account of their race or color is that each of those clauses admits some negroes and excludes some white men. For example, the clause that admits all descendants of persons who were entitled to vote anywhere in the United States prior to 1868. Negroes could vote in Maryland prior to 1802. *Hughes vs. Jackson*, 12 Md., 450, 464. They could vote in North Carolina up to 1833, and in Massachusetts ever since the Declaration of Independence. Prior to 1868, they could vote in Alabama, and in many northern and western States. All such negroes and their descendants can qualify under this clause. It goes without saying that there are many white men who could not qualify under this clause, and some who could not qualify under any other clause of the Act. For instance, a white man born in this country of parents who were never naturalized, couldn't vote under this law unless he pays taxes on \$500 worth of property. Moreover, no white man of illegitimate birth can vote unless he is a taxpayer.

The Fifteenth Amendment does not forbid discrimination on account of some line of demarkation which comes near a race or color line. It is confined to race or color strictly. You cannot, by circumlocution, define a negro; but you are at perfect liberty to draw a line which excludes a great many more negroes than white men. *If*

*this be not so, then a simple property qualification applicable to white and blacks equally would be invalid.*

It is a canon of constitutional interpretation that some effect is, if possible, to be given to every word. Consequently, the Fifteenth Amendment, a construction of the words "race, color or previous condition of servitude" must be adopted which would make no one of them surplusage. In other words, such a construction must be given to "race" as would permit a discrimination on the ground of "color or previous condition of servitude" if the latter words had been omitted. Yet if the words "previous condition of servitude" had been omitted, a discrimination on the ground of former slavery would have excluded nobody but negroes, and practically almost all of that race. Yet such a discrimination would not have been a discrimination "on account of race or color" and would have been permissible. To guard against it, the words "previous condition of servitude" were inserted in the Amendment. We submit that this illustration shows the narrow scope attributed by the framers of the Amendment to the words "race" and "color."

In his brief in the Oklahoma case, recently argued before this Court, the learned Solicitor General argued that the statutes of other States and countries were to be read into the suffrage clause of Oklahoma Constitution, and more especially the so-called Grandfather's clause thereof, by reason of the reference in the Grandfather's Clause to the right of would-be voters in Oklahoma to vote prior to 1868. His argument was that if, under the laws of any other State or country, the complaining party would have been excluded on account of his race, color or previous condition, then it followed that the Oklahoma law excluded him from the right to vote—abridged or denied his right to vote—on account of his race, color, etc.

It is submitted that this is a manifest *non sequitur*. Applying the proposition to the Maryland law in question—Annapolis Registration Law, this law denies to

illiterate persons the right to vote at municipal elections in the City of Annapolis, if they were not entitled to vote in the State of Maryland or in some other State of the United States on the 1st of January, 1869, no matter whether their exclusion from the right of suffrage in those States was on account of their race, on account of their lack of property, on account of their illiteracy, on account of their lack of good moral character, or any other cause. The fact that this particular plaintiff happens to live in Maryland in 1869, where he was excluded because of his color, does not affect the matter.

If he had been living in some other State where he was excluded for some other cause, the Annapolis Law would have excluded him just the same.

*These Cases are Controlled by Giles vs. Harris, 189, U. S., 475.*

But we submit that the case at bar is controlled by *Giles vs. Harris, 189, U. S., 475.*

This Act must stand or fall as an entirety. Its provisions are inseparable. An entire system of registration is provided for. The defendants by Section 1 of the Act were only to be *appointed* to register the persons having the qualifications provided in Section 4.

The classes of persons to be registered as provided in that section were intended to cover *all persons*, applying for registration. If one of those classes is stricken out it leaves the others incomplete. It is perfectly clear that this Act would not have been passed unless class three had been included. This is the test:

“Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only *where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated.*” *Employers Liability Cases, 207 U. S., 50.*

Assuming, therefore, plaintiffs' contention to be cor-

rect, they are out of Court. The whole Act falling with the provision in Section 4, fixing Class 3, the defendants deprived the plaintiffs of no right. *There could be no right in anybody under a void law.* Plaintiffs are suing for a right under an Act which never had any existence according to their contention.

In *Giles vs. Harris*, supra, the plaintiff filed a bill in the Circuit Court of the United States for the District of Alabama, in which he claimed that certain provisions of the Constitution of Alabama regulating the registration of voters were void, because they permitted fraudulent discrimination against persons of the negro race on account of their color. The prayer of his bill was that the officers of registration be ordered to put his name upon the registration lists, regardless of the void provisions of the Alabama Constitution.

In dealing with the position of the plaintiff in that case, in asking the Court to register him, under a constitution which he alleged to be void, the Court said:

“The difficulties which we cannot overcome are two, and the first is this: The plaintiff alleges that the whole registration scheme of the Alabama Constitution is a fraud upon the Constitution of the United States, and asks us to declare it void. But, of course, he could not maintain a bill for a mere declaration in the air. He does not try to do so, but asks to be registered as a party qualified under the void instrument. If then we accept the conclusion which it is the chief purpose of the bill to maintain, how can we make the Court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists? If a white man came here on the same general allegations, admitting his sympathy with the plan, but alleging some special prejudice that had kept him off the lists, we hardly should think it necessary to meet him with a reasoned answer. But the relief cannot be varied because we think that in the future the particular plaintiff is likely to try to overthrow the scheme. If we accept the plaintiff's allegations for the

purpose of his case he cannot complain. We must accept or reject them. It is impossible to simply shut our eyes, put the plaintiff on the lists, be they honest or fraudulent, and leave the determination of the fundamental question for the future. If we have an opinion that the bill is right on its face, or if we are undecided, we are not at liberty to assume it to be wrong for the purposes of decision.

\* \* \* If the sections of the Constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent. We express no opinion as to the alleged fact of their unconstitutionality beyond saying that we are not willing to assume that they are valid in the face of the allegations and main object of the bill, for the purpose of granting the relief which it was necessary to pray in order that that object should be secured." Pages 486-7.

See also, *Giles vs. Teasley*, 193 U. S., 160.

In *Giles vs. Teasley*, 136, Ala., 165 (affirmed 193 U. S., 160, on question of jurisdiction) which was an action for damages based upon substantially the same allegation as those here, the Court said:

"If we accept (without deciding) as correct the instance laid in appellant's brief that Section 186 of Article VIII of the Constitution of 1901 is void because repugnant to the Fourteenth and Fifteenth Amendments of the Constitution of the United States, then the defendants were wholly without authority to register the plaintiff as a voter, and their refusal to do so cannot be made the predicate for a recovery of damages against them."

It would, therefore, seem clear that if plaintiffs' allegations are taken as correct they can have no standing in this Court to maintain the present action. They cannot claim in one breath that a registration law is void and in another that they have been deprived of a right under it.

It will be observed that the law which is here attacked is

but a re-enactment of the registration law previously existing, with the addition only of the very provisions which the plaintiff claims are void because of being in conflict with the Fifteenth Amendment. Manifestly the only purpose which the Legislature could have had in enacting this statute was to incorporate these very provisions and it is, of course, therefore impossible to believe that the Act would ever have been passed without these disputed sections. Without them it does not change the law as it already existed, and would, therefore, be a totally vain and meaningless enactment. Maryland Code of Public Local Laws of 1888—Art. 2, Sec. 28, Page 100, provides that: “The citizens of Annapolis, *qualified to vote for members of the General Assembly* of Maryland, shall, on the second Monday of July in the year 1877, and every two years thereafter, elect by ballot a Mayor Counsellor, and the voters in each ward shall, at the same time, elect by ballot two residents thereof as all the men who shall constitute the corporation of said city under the name and style of the Mayor Counsellor, and all the men of the City of Annapolis.”

The only qualifications required “to vote for members of the General Assembly of Maryland” are those of age, sex and residence in the State for one year and in the county for six months next preceding the election, provided by Section 1 of Article 1 of the Constitution of Maryland of 1867, now in force.

*Therefore, when the plaintiff alleges that these sections are void, he, in effect, alleges that the whole Act under which he claims the right to be registered is void, and under the decision of the Supreme Court in Giles vs. Harris, above cited, cannot recover.*

But upon the other hand, it is difficult to see how plaintiffs can maintain their present actions upon the theory that only parts of the Act of 1908 are to be stricken down. They really only complain of that provision of Section 4, fixing class three.

Surely it will not even be suggested that the qualifications fixed under Classes 1, 2 and 2½ are in any way in conflict with the Fifteenth Amendment. If plaintiffs contend that any part of the Act must stand, they are bound to allow the provisions fixing these classes to remain.

*None of the plaintiffs allege that he possessed the qualifications necessary to bring him within any of these three classes, that is, Classes 1, 2 and 2½, at the time he applied for registration.*

How can it then be said that plaintiffs have been deprived of their right to register on account of race or color by the law of the State of Maryland, when, even if the provision questioned by them is stricken out, they would still not be qualified under what must be admitted to be perfectly valid provisions. It therefore results that in no event, and entirely regardless of the particular clause of Section 4, assailed by the plaintiffs, that they have not shown that they were entitled to register at the time in question, and consequently were not, according to their own contention, deprived of any right whatever by the defendants.

The answer of the learned Court below to the above contention is as follows:

“It is suggested in argument that if the Clause in question of the Maryland Statute is by the Fifteenth Amendment rendered invalid, the whole statute falls with it, and the registrars had no power to register any one under it. This was held in *Giles vs. Harris*, 189 U. S., 475, where the complainant alleged that the whole registration scheme of the Alabama Constitution was a fraud on the Constitution of the United States and void, and asked the Court in an equity suit to so declare, at the same time asking the Court to decree that the complainant be registered. The Court held that if the complainant's contention was sustained and the whole scheme declared void, there was no warrant of law for registering him at all. The plaintiffs make no such election or contention in this case. The law is recog-

nized as valid in all these provisions except the one which discriminates; and the plaintiffs allege that but for that discriminating clause they would have been entitled to register."

In answer to this it is respectfully submitted, as already suggested, that inasmuch as the clause in question, that is, those portions of Section 4 of the Act beginning with "and who shall come within any one of the three following classes" (the same not being really a separate clause at all), is manifestly an essential part of the whole scheme of registration and qualification of voters contemplated by the Act and clearly inseparable from the balance, and inasmuch as it is perfectly clear that the Legislature would not have enacted this law without this so-called clause, an allegation that this clause is void is equivalent to the allegation that the whole act is void. But, aside from this, *even if the plaintiff made no allegation of the invalidity of the Act or any portion thereof, the legal situation would remain the same.*

Assuming that it is clear that the Act is either void as a whole or valid as a whole—and we respectfully submit that it must be—then in either event the plaintiff cannot recover damages in this case, because if the act is valid (and the Court must certainly adopt one theory or the other, either that it is void or valid, in order to allow a recovery), then the defendants have done nothing except that which was their lawful duty to do in registering the plaintiff.

If, on the other hand, the Act is void, then, as they had no powers whatever as registration officers, *except such as were conferred by the Act*, or attempted to be conferred by the Act, they had no power or lawful right to register the plaintiffs, and the latter can certainly not claim damages for the failure of the defendants to do a thing which they had no lawful right or power to do.

But suppose we assume, for the sake of the argument, that this Court should hold that the so-called Grandfather

Clause (Clause 3 of Section 4) *alone* is void, and that the balance of the act remains valid; what would be the consequence? Manifestly the plaintiffs would still not be entitled to recover.

It is admitted (Record, page 26) that they did not possess the qualifications required by the remainder of the Act, that is, those required under Clauses 1, 2 or 2½, because they did not any one of them possess the five hundred dollars' worth of property, nor was any one of them a naturalized citizen or the descendant of a naturalized citizen, so that in no event, no matter whether the statute be held valid as a whole or invalid as a whole, or valid in part and void in part, can this action be maintained.

*For these reasons it is respectfully submitted that the question as to whether this Annapolis Registration Law, or clause 3 of Section 4 thereof, or any part thereof, is valid or invalid, constitutional or unconstitutional, is an immaterial question in this case, for the reason that the decision of the question would not affect the rights of the plaintiff to recover one way or the other.*

If, in answer to this, it be argued that the effect of sustaining this contention will be to render it impossible to enforce the Fifteenth Amendment, or hold the defendants liable in any way, the answer may be found in what was said by this Court in the case of *Giles vs. Teasley*, 193 U. S., 166.

"It is apparent that the thing complained of, so far as it involves rights secured under the Federal Constitution, is the action of the *State of Alabama* (Maryland) in the adoption and enforcing of a constitution with the purpose of excluding from the exercise of the right of suffrage the negro voters of the State, in violation of the Fifteenth Amendment to the Constitution of the United States. The great difficulty of reaching the political action of a State through remedies afforded in the Courts, State or Federal, was suggested by this Court in *Giles vs. Harris*, *supra*."

The truth of the whole matter is this: *These defendants* have done nothing—they have not been in a *position to do anything*—to injure the plaintiffs, according to the plaintiffs' own theory of the law.

If the plaintiffs had any grievance, it is against the State of Maryland, and their appeal must be to "the political and legislative department of the Government."

If the Fifteenth Amendment is valid, under Section 2, Congress has absolute "power" to adopt any measure which, in its judgment, may be "appropriate" to enforce the Amendment; that is to say, to *compel a State* to obey. *It has power to legislate directly against a State*, to subject it to any coercion which it may see fit, such as its denial of its representation in Congress, withdrawal of the United States mails, etc. It has no right to shirk its responsibility or attempt to devolve it upon the judicial branch of the government.

It is a favorite device of politicians to enact all sorts of loose and vague legislation, and then make the Courts take the blame and popular disfavor growing out of what is obscure or unenforceable, but Congress cannot escape the responsibility in this case.

## SCOPE OF THE FIFTEENTH AMENDMENT.

### III.

THAT THE INHIBITIONS CONTAINED IN THE FIFTEENTH AMENDMENT AGAINST THE DENIAL OR ABRIDGMENT OF "THE RIGHT OF CITIZENS OF THE UNITED STATES TO VOTE ON ACCOUNT OF RACE, COLOR OR PREVIOUS CONDITION OF SERVITUDE, IS BY THE PLAIN LANGUAGE OF THE AMENDMENT MADE TO APPLY ONLY TO THE RIGHT TO VOTE WHICH CITIZENS OF THE UNITED STATES HAVE BY VIRTUE OF SUCH CITIZENSHIP, THAT IS, THE RIGHT TO

VOTE DERIVED FROM THE UNITED STATES, AND THAT THE INHIBITION THEREIN CONTAINED DOES NOT APPLY TO OR IN ANY WAY AFFECT THE RIGHT TO VOTE IN STATE OR MUNICIPAL ELECTIONS CONFERRED BY A STATE UPON ANY OF ITS CITIZENS.

Whatever may be the impression generally prevailing regarding the state of authoritative decision upon the proposition now to be discussed, we think it can be established to the satisfaction of the judicial mind that there is in reality no obstacle in the way of a determination by this Court of the true meaning and effect of the simple sentence composing the first section of the Fifteenth Amendment. And such being the case, we believe that the soundness of the proposition which we have laid down above can be sustained by reasons which amount to demonstration.

Section 1 of the Fifteenth Amendment is as follows:

“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.”

The subject-matter, by the very words of the amendment, is: *the right of citizens of the United States to vote*. No other citizens than those of the United States, and no other right to vote than that of such citizens is mentioned. And yet it is asserted, in the face of this, that it is not only the right to vote of citizens of the United States that is dealt with, but also the right to vote of citizens of the several States.

It has been as explicitly and firmly settled by supreme judicial decision as anything can be, that the term *citizens of the United States* means national citizenship, citizens in their relation to the government of the United States. And by equal authority it is established that this term alone does not comprehend citizenship of a State; that

although the main body of National citizens and State citizens may be composed of the same persons, still their citizenship with regard to each government is separate and distinct.

In the great Slaughter House Cases, 16 Wallace, at pages 72, 73, 74 and 75, Mr. Justice Miller discusses this whole question of dual citizenship, and quotations from the opinion of the Court in those cases, delivered by him, renders unnecessary any independent discussion.

“The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by Act of Congress. It had been the occasion of much discussion in the Courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this Court, in the celebrated Dred Scott case, only a few years before the outbreak of the Civil War, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

“To remove this difficulty primarily and to establish a clear and comprehensive definition of citizenship which

should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section (of the Fourteenth Amendment) was framed.

“ ‘All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.’

“The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase ‘subject to its jurisdiction’ was intended to exclude from its operation children of ministers, consuls and citizens or subjects of foreign states born within the United States.

“The next observation is more important, in view of the arguments of counsel in the present case. It is that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

“It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are *distinct from each other*, and which depend upon different characteristics or circumstances in the individual.

“We think this distinction and its explicit recognition in this amendment of great weight in this argument, be-

cause the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

“The language is, ‘No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States*.’ It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adapted understandingly and with a purpose.

“Of the privileges and immunities of the citizens of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; *but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.*

“If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.”

This great decision, which many have thought to be more far-reaching in its consequences than any announced by the Supreme Court since the Civil War, puts at rest forever all controversy about the principle for which we contend.

It is there announced in unmistakable language that when *rights of "citizens of the United States"* are mentioned in the Federal Constitution, *only those rights which come from the National Government* are intended.

The human mind cannot conceive of anything which can prevent the reasoning and the actual determination in that case from applying to and controlling the language of the Fifteenth Amendment. Every argument advanced, and every step of reasoning that led the Court to the result reached in the Slaughter Houses Cases, applies absolutely and precisely to the Fifteenth Amendment.

In the case of *Twining vs. New Jersey*, 211 U. S., 96, in referring to the decision in the Slaughter House Cases, the Court said, Mr. Justice Moody delivering the opinion:

"Criticism of this case has never entirely ceased, nor has it ever received universal assent by members of this Court. Undoubtedly it gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended, and disappointed many others. On the other hand, if the views of the minority had prevailed, it is easy to see how far the *authority and independence of the States* would have been diminished, by subjecting all their legislative and judicial acts to correction by the legislative and review by the judicial branch of the National Government. But we need not now inquire into the merits of the original dispute. This part at least of the Slaughter House Cases has been steadily adhered to by this Court, so that it was said of it, in a case where the same clause of the amendment was under consideration (*Maxwell vs. Dow*, 176, U. S., 591): 'The opinion upon the matters *actually involved* and maintained by the judgment in the case have never been doubted or overruled by any judgment of this Court.'

"*The distinction between National and State citizenship and their respective privileges there drawn has come to be firmly established.* And so it was held that the right

of peaceable assembly for a lawful purpose (it not appearing that the purpose had any reference to the National Government) was not a right secured by the Constitution of the United States, although it was said that the right existed before the adoption of the Constitution of the United States, and that 'it is and always has been one of the attributes of citizenship under a free government.' *U. S. vs. Cruikshank*, 92 U. S., 542."

As stated in the foregoing opinion delivered in 1908, the distinction taken by the Court in the Slaughter House Cases between National citizenship and State citizenship and between the rights of National citizenship and of State citizenship has been affirmed and adjudicated in case after case.

*Maxwell vs. Dow*, 176 U. S., 581;  
*Hodges vs. U. S.*, 203 U. S., 1;  
*West vs. Louisiana*, 194 U. S., 258;  
*Duncan vs. Missouri*, 152 U. S., 377;  
*O'Neil vs. Vermont*, 144 U. S., 323;  
*In re Kemmler*, 136 U. S., 444;  
*Pressler vs. Illinois*, 116 U. S., 252;  
*Hurtado vs. California*, 110 U. S., 516;  
*Walker vs. Sauvinet*, 92 U. S., 90;  
*U. S. vs. Cruikshank*, 92 U. S., 542.

The criticism which is referred to by Mr. Justice Moody as having been passed upon the decision in the Slaughter House Cases has never been directed against this distinction. We believe that in nearly all the dissenting opinions in the cases involving the construction of the privileges and immunities clause of the Fourteenth Amendment have recognized that such a distinction clearly exists. Take for example the dissenting opinion of Mr. Justice Swayne in the Slaughter House Cases. He says: "The citizen of a State has the same fundamental rights as a citizen of the United States, and also certain others, local in their character, arising from his

relation to the State, and in addition, those which belong to the citizen of the United States, he being in that relation also. There may be a double citizenship, each having some rights peculiar to itself. *It is only over those which belong to the citizen of the United States that the category here in question throws the shield of its protection. All those which belong to the citizen of a State, except as to bills of attainder, ex post facto laws, and laws impairing obligations of contracts are left to the guardianship of the bills of rights, constitution and laws of the States, respectively."*

See also the dissenting opinion of Mr. Justice Bradley in the same cases, 16 Wall, 114, 116.

Whatever dissent there has been from the decision in the Slaughter House Cases, since it was announced, has been due solely to a difference of opinion as to what are the fundamental rights inhering in National citizenship.

Some of the dissenting justices in the many cases that have followed have maintained that certain rights attached to National citizenship which the majority held did not.

*But there has never been any dissent from the proposition that unless a particular right is one inhering in National citizenship as distinguished from State citizenship, it is not within the protection of the privileges and immunities clause of the Fourteenth Amendment.*

It was not until the case of Maxwell vs. Dow, 176 U. S., 581, that it was finally decided that the rights secured in the "Bill of Rights of the Federal Constitution" were not included within the "privileges and immunities of citizens of the United States."

There were many who believed until this decision, that it would never be held that these rights were not within the protection of the Fourteenth Amendment. It was argued that they were derived from the Constitution itself, and that they, therefore, must be embraced within

the privileges and immunities of citizens of the United States mentioned in the Fourteenth Amendment.

But following a long established canon of construction, the Court held that the rights secured by the first eight amendments were so secured only from violation by the Federal Government. That the Fourteenth Amendment did not enlarge the scope of the first eight amendments and make them operative upon the States, nor did it bring the rights mentioned in these amendments within the "privileges and immunities of citizens of the United States."

*Independently of the authority of the Slaughter House Case and the cases that have followed it, the interpretation here contended for is made necessary by still another principle, which has governed the Supreme Court from its foundation, in the interpretation of the Constitution of the United States.*

*That Constitution being ordained for the purpose of conferring power and fixing limitations upon the Federal Government, none of its provisions can be held to apply to the governments of the States themselves, unless the States are expressly included therein.*

In the case of *Barron vs. Baltimore*, 7 Peters, 247, Chief Justice Marshall said: "The Constitution was ordained and established by the people of the United States for themselves for their own government and not for the government of the individual States. Each State established a Constitution for itself, and in that Constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally and we think necessarily applicable to the government created

**"Sec. 2. The Congress shall have power to enforce this  
Article by appropriate legislation."**

by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes." Page 247. (*Italics ours.*)

"Had the framers of these amendments intended them to be limitations on the powers of the State governments, they would have imitated the framers of the original Constitution and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the Constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language."

With this distinction between State rights and National rights, and State citizenship and Federal citizenship established beyond all controversy, let us revert to the language of the Fifteenth Amendment.

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

Paraphrasing the language of Mr. Justice Miller with regard to the meaning of the Fourteenth Amendment we may say, that to withdraw the mind from the contemplation of this simple declaration with regard to the right of citizens of the United States to vote and with a microscopic search endeavor to find out in it a reference to the right to vote of citizens of a State, requires an effort to say the least of it.

The Fourteenth Amendment reads as follows:

"Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.*"

When we remember that the language of the Fourteenth Amendment clearly distinguishing National from State citizenship had been before the country for three years before the Fifteenth Amendment was proposed the following language of Mr. Justice Miller with regard to the privileges and immunities clause of the Fourteenth Amendment may be repeated with tenfold force.

"It is a little remarkable, if this clause was intended as a protection to the citizens of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose."

And any question that the words "*citizen of a State*" were designedly omitted would seem to pass the point of argument when it is known that the resolution which was finally adopted and became the Fifteenth Amendment, read when originally introduced in Congress:

"No State shall deny or abridge *the right of its citizens* to vote and hold office on account of race, color or previous condition."

The judiciary committee reported back the resolution in this form:

"The right of *citizens of the United States* to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color or previous condition of servitude." Omitting the words "and hold office," which were stricken out in conference between the two Houses, *this is the form in which it was adopted.*

Cong. Globe, 1868-69, pt. I, p. 542, Jan. 23, 1869.

And if we refer to the Fourteenth Amendment, Section 2, where the "right to vote" was also dealt with, we will find that the distinction between the right to vote at

State elections and the right to vote at National elections was clearly recognized.

Section 2, of the Fourteenth Amendment provides:

“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to *any of the male inhabitants of each State*, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”

This section as clearly as words well can, shows that the difference between the right to vote at State and National elections was recognized. If not why was the term “right to vote,” followed by a specific enumeration of Federal and State officers?

And the language further shows that it was understood that the words *right to vote of citizens of the United States* would not even, when used in connection with a specific enumeration of Federal and State offices, be effective, because it was known that *citizens of the United States* had no right to vote for the State offices mentioned.

As it therefore had to be made clear that it was the purpose of the Amendment to refer to *citizens of the United States*, as a class of individuals, we find the term *right to vote* coupled with the words “*of any male inhabitants of such State, being twenty-one years of age, and citizens of the United States.*”

So that if it is answered that “citizens of the United

States" as contained in the Fifteenth Amendment is meant to define a class of individuals and is not intended to refer to a status, not only can it be answered that an unbroken line of cases has adjudicated that this is not so, and that a great canon of construction which has guided the Supreme Court for nearly a hundred years in the determination of cases before it forbids such an interpretation being placed upon the language, but in addition to all this the Fourteenth Amendment can be pointed to where the language was intended to have the effect now claimed for that of the Fifteenth, and by contrasting the language employed refute the contention that the term "citizens of the United States" as used in the Fifteenth Amendment was not intended to have its ordinary constitutional meaning.

But if this Fifteenth Amendment be viewed in the light of the history of the time, it will be easily understood why it was enacted in such form as to make it not applicable to State or municipal elections; and a glance at the records of Congress will show why every effort to amend the bill, by broadening its scope so as to make it apply to State and municipal elections, was voted down.

During the period between the close of the Civil War and the introduction of the bill submitting the Fifteenth Amendment to Congress, that is to say, between 1865 and January 1, 1869, the question of granting the franchise to the negroes had been widely discussed in this country. It had been the subject of much heated debate.

In several of the Northern and Western States the propositions had been submitted to the people in the form of amendments to State Constitutions. In every instance these amendments had been overwhelmingly defeated at the polls. In the State of Ohio, for instance, the majority against the proposition was something like one hundred thousand.

These occurrences have made it manifest to everyone, and especially to all party leaders, that the people of the

country were strongly opposed to the idea of depriving any of the loyal States of the Union, at any rate, of the power which they had always possessed of regulating suffrage and determining who should constitute electorate of the State.

In order to avoid exposing itself to conflict with this manifest public sentiment, the Republican Party, in its National Platform adopted in the summer of 1868, the platform upon which General Grant and the Republican House of Representatives were elected in November of that year, contained the following distinct pledge: "THE QUESTION OF SUFFRAGE IN ALL THE LOYAL STATES PROPERLY BELONGS TO THE PEOPLE OF THOSE STATES."

After such a pledge as this, the enactment of any amendment in such form as to dilute the electorate of a loyal State like Maryland, without its consent with a sudden infusion of near a hundred thousand illiterate black voters, would have been an act of perfidy unparalleled in history; hence the Amendment was properly drawn so as to leave the question of suffrage in all the loyal States, so far as it affected either State or municipal governments, where it "properly belonged," that is, "with the people of those States."

It will be asked what right has a citizen of the United States to vote, as contrasted with a citizen of a State? We answer, beyond doubt the right to vote *for members of Congress* (and now for United States Senators).

Article 1, Section 2, of the Constitution of the United States provides:

"The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State, shall have the qualifications requisite for electors of the most numerous branch of the State Legislature."

Here the right to vote for members of Congress is given

directly by the Constitution to people of the several States, having the qualifications of electors of the most numerous branch of the State Legislature.

Although the qualifications are the same as those of the State electors for the most numerous branch of the State Legislature, the right of persons having such qualifications to vote for members of Congress is a right coming from the National Government.

Ex-parte Yarbrough, 110 U. S., 651;

Wiley vs. Sinler, 179 U. S., 58;

Swafford vs. Templeton, 185 U. S., 491.

It may be complained that to limit the right to vote of citizens of the United States to the mere right of voting for members of Congress, would so narrow the scope of the amendment, as to make it evident that such a meaning could never have been intended.

The first and main answer to this suggestion is that the plain words of the amendment forbid any other construction. But will anyone contend that to secure the right to vote without discrimination for members of Congress is not grave enough subject to form the substance of a constitutional amendment?

To obliterate all discrimination on account of race, etc., so far as Congressional elections are concerned which the States have made in fixing the qualifications of the electors of the most numerous branch of their Legislatures, and to permit citizens of the United States regardless of such discrimination to vote for members of Congress, works a most substantial result, and it cannot make the Fifteenth Amendment frivolous to give it any such effect.

*The same kind of argument was made in the Slaughter House cases and has been repeated time and again in the cases which have followed, dealing with the privileges and immunities clause of the Fourteenth Amendment.*

Mr. Justice Field in his dissenting opinion in the Slaughter House cases in enforcing this argument of un-

due restriction as applied to the Fourteenth Amendment, said:

"If this inhibition has no reference to privileges and immunities of this character, but only refers as held by the majority of the Court in their opinion, to such privileges and immunities as were before its adoption specifically designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. *With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new Constitutional provision was required to inhibit such interference.* The Supremacy of the Constitution and Laws of the United States always controlled any State legislation of that character. But if the amendment refers to the natural and inalienable right which belongs to all citizens, the inhibition has a profound significance and consequence." 16 Wal., 96.

Judge Cooley in his Principles of Constitutional law, 258, says:

"It may well be questioned whether the provision just mentioned (privileges and immunities clause) was necessary. It is certainly not clear that there can exist any privilege or immunity of a citizen of the Amendment, is not beyond State control.

*Even in the face of this kind of argument, reducing the privileges and immunities clause of the Fourteenth Amendment to a nullity the Court yet felt itself bound by the plain language of the amendment itself, and would not interpolate other language in order to give it a meaning other than that clearly expressed.*

Here, however, with regard to the Fifteenth Amendment even such argument is without force. Taking the language as clearly expressed therein, and giving in its ordinary meaning and effect a great substantial right is guaranteed thereby.

Reference no doubt will be made to the Debates in Congress and to contemporaneous construction by Congressional and Executive action. None of these sources has ever been regarded by the Courts as enlightening. It has always been recognized that the time in which these war amendments were proposed and ratified, was one of violent party strife, and not a time when men's opinion were weighed or their expressions guarded. While this has never been the expressed reason for the disregard of the utterances of public men, and the legislative and executive action upon these war amendments, it is no doubt largely accounted for on this ground; but at any rate such is the fact.

Speaking for the Court in the case of Maxwell vs. Dow, 176 U. S., 601, Mr. Justice Peckham said with regard to statements in Congress while the resolutions proposing the Fourteenth Amendment was under consideration:

"Counsel for plaintiff in error has cited from the speech of one of the Senators of the United States, made in the Senate when the proposed Fourteenth Amendment was under consideration by that body, wherein he stated that among the privileges and immunities which the committee having the amendment in charge sought to protect against invasion or abridgment by States, were included those set forth in the first eight amendments to the Constitution, and counsel has argued that this Court should, therefore, give that construction to the amendment which was contended for by the Senator in his speech.

"What speeches were made by other Senators, and by Representatives in the House upon this subject is not stated by counsel, nor does he state what construction was given to it if any, by other members of Congress. It is clear that what is said in Congress upon such an occasion may or may not express the views of the majority of those who favor the adoption of the measure which may be before that body, *and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it*

*did, is one to be determined by the language actually therein used and not by the speeches made regarding it.*

“What individual Senators or Representatives may have urged in debate in regard to the meaning to be given to a proposed Constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it. *U. S. vs. Trans-Missouri Freight Association*, 166 U. S., 318; *Dunlap vs. U. S.*, 65, 75.

“In the case of a Constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A Constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the Legislatures or by conventions in three-fourths of the States before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it if there be therein any doubtful expression in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. This rule could not, of course, be so used to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit.”

Speaking of the legislative history of the Sherman Act and the debates upon it, the same Justice said in *U. S. vs. Freight Association*, 166 U. S., 318:

“Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each House in relation to the meaning of the Act. It cannot be said that a majority of both Houses did not agree with Senator Hoar in his views as to the construction to be given to the Act as it passed the Senate. All that can be determined from the

debates and reports is that various members had various views, and we are left to determine the meaning of this Act as we determine the meaning of other Acts *from the language used therein.*

"There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. U. S. vs. Union Pacific R. Co., 91 U. S., 72; Aldridge vs. Williams, 3 How., 9, 24, Taney, Chief Justice; Mitchell vs. Great Works M. & M. Co., 2 Story, 648, 653; Queen vs. Hertford College, 3 Q. B. D., 693, 707."

No one would venture to say that there were not members of each House of Congress who voted with the majority upon the resolutions proposing the Fifteenth Amendment who appreciated the distinction between National and State citizenship clearly recognized in the amendment, and that such was not the case *in the various Legislatures* that finally ratified it afterwards. The great diversity of opinion which existed in the period immediately following the Civil War upon the suffrage question is too well known to be referred to here. It would be attempting a great deal to show that there was any well-defined and settled purpose prompting this amendment beyond that clearly expressed therein.

But apart from this, we have seen that it is only in cases of ambiguity or doubt in the language used that the Courts can look to any extrinsic matters to determine the meaning of a Constitutional provision. Here we have seen there is no ambiguity whatever, the language used being plain and having a fixed, well understood meaning.

As declared by Judge Story in his work on the Constitution, Sec. 1908:

"What is to become of Constitutions of governments if they are to rest, not upon the plain import of their words, but upon conjectural enlargements and restric-

tions to suit the temporary passions and interests of the day? Let us never forget that our Constitutions of government are solemn instruments, addressed to the common sense of the people and designed to fix and perpetuate their rights and their liberties. They are not to be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders. They are to speak in the same voice now and forever. *They are of no man's private interpretation.* They are ordained by the will of the people, and can be changed only by the sovereign command of the people."

Chief Justice Marshall in the case of *Gibbons vs. Ogden*, 9 Wheat, 1, 188, said:

"As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said."

There is no way of avoiding the proposition, so many times adjudicated, that the language of the Fifteenth, when read in its plain ordinary meaning, only covers the right to vote of citizens of the United States.

Neither the contemporaneous construction of the Departments of the Federal Government, nor what might be termed the public construction of this language, can change its obvious meaning. And the fact cannot be concealed that the legislative and executive construction which has in fact been placed upon this amendment is worthless so far as aiding in its true interpretation is concerned. Beginning with the case of *U. S. vs. Reese*, in 92 U. S., 214, and coming down to that of *James vs. Bowman*, in 190 U. S., 122, *the Courts have overruled the construction placed by Congress upon the Fifteenth Amendment* by striking down as unconstitutional the statutes passed to enforce it.

There is no parallel in the whole history of legislation to this total misconception by a legislative body of the effect and meaning of a plain, simple set of words. The statutes invalidated by the Supreme Court in these cases were enacted contemporaneously with the ratification of the amendment, *and were voted for by the same men who proposed it, but this has had no weight with the Supreme Court in the face of the clear language of the amendment itself.*

That this may be the first case in which the proposition now maintained has been urged, argued nothing against it. Mere delay in presenting a contention has never prevented the Courts from accepting it, if it can be supported by sound reasoning and justified by precedent.

In *Fairbanks vs. U. S.*, 181 U. S., 283, the Supreme Court had before it for the first time the question as to whether a stamp tax upon a foreign bill of lading was equivalent to a tax upon the articles included therein, so as to make the tax unconstitutional under Article 1, Section 9, of the Constitution of the United States, providing "no tax or duty shall be laid on articles exported from any State." This stamp tax had been imposed three times in the history of the government; first, from 1797 to 1802; second, from 1862-1872; third, from 1898 until the decision in the above case, and its constitutionality had never before been challenged. In holding the tax void the Court said, after reviewing all the decisions dealing with the question of the effect of practical construction:

"From this *résumé* of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no doubt we have steadfastly declined to recognize any force in

practical construction. Thus before any appeal can be made to practical construction, it must appear that the true meaning is doubtful."

"We have no disposition to belittle the significance of this matter. It is always entitled to careful consideration, and in doubtful cases, as we have shown, often turn the scale; but when the meaning and scope of a Constitutional provision are clear, it cannot be overthrown by legislative action, although several times repeated and never before challenged. It will be perceived that these stamp duties have been in force during only three periods: first, from 1797 to 1802; second, from 1862 to 1872; and third, commencing with the recent statute of 1898. It must be borne in mind also in respect to this matter that during the first periods exports were limited, and the amount of the stamp duty was small, and that during the second period *we were passing through the stress of a great civil war or endeavoring to carry its enormous debt; so that it is not strange that the legislative action in this respect passed unchallenged.* Indeed, it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of government, that the objects and modes of taxation have become a matter of special scrutiny. *But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution.*" Pages 311 and 312. (Italics ours.)

In *United States vs. Graham*, 110 U. S., 219, Chief Justice Waite said:

"Such being the case, it matters not what practice of the departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and 'it is not allowable to interpret what has no need of interpretation. If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and

precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid.' "

See collection of all the authorities upon this point in *Fairbanks vs. U. S.*, 181 U. S., 308-312.

The question remains: Is there any binding adjudication precluding this Court from giving the Fifteenth Amendment its obvious effect. We believe it can be shown that there is none. When, as we have demonstrated, that as a matter of original inquiry there is no room for doubt or difference upon this question, we do not believe that anything short of an express adjudication, binding upon this Court under a just application of the rule of *stare decisis* will be deemed controlling, and that no mere *dicta*, wherever found, will ever lead this Court into accepting a construction other than that compelled by the plain language of the Supreme law itself. Now and for all time until it is changed in the way therein provided, the Constitution remains the Supreme law of the land. When the Supreme Court of the United States, in which the power of interpretation is lodged by the Constitution, has in a case requiring it, exercised its power and settled the meaning of a particular provision, this interpretation, until overruled by that tribunal, is binding upon all the Courts of the land, all the departments of the government, and every citizen. But in order for any interpretation of the Supreme Court to have *this effect*, it must be given in a case where such interpretation is rendered necessary in order to decide the case before it. Otherwise that Court would be exercising a power not conferred by the Constitution upon it, and the Supreme law itself might be changed or modified by a tribunal created only to interpret it.

*In no case that has been decided by this Court has the point here made been raised or argued, and we think we can demonstrate that no case has ever been before this tribunal where the question was considered or where its determination was necessary to the decision of the case.*

Language will undoubtedly be found in a number of the opinions in cases in the Supreme Court which is contrary to the contention here made. But we believe there is but one of these cases which it will even be contended approaches a *decision* of the point. The utterance in all the other cases being so clearly *obiter dicta* we shall not discuss them separately.

Before taking up the examination of the case of *Neal vs. Delaware*, 103 U. S., let us see what rule we are to determine the question as to how far the language of an opinion is binding. In the case of *U. S. vs. Lee*, 106 U. S., 216, the question was, whether officers and agents of the United States wrongfully in possession of real property could be sued by the rightful owner to recover possession. The case of *Carr vs. U. S.*, 98 U. S., 433, was relied upon by the Government wherein there were expressions to the effect that neither the United States nor its officers could be sued in such an action as that before the Court in *U. S. vs. Lee*.

Mr. Justice Miller, speaking for the Court, said:

"It is true that there are expressions in the opinion of the Court in the case of *Carr vs. U. S.*, 98 U. S., 433, which are relied on by counsel with much confidence as asserting a different doctrine. \* \* \* As these remarks were not necessary to the decision of the point then in question, *as the action was equally inconclusive against the United States, whether the persons sued were officers of the government or not*, these remarks, if they have the meaning which counsel attribute to them, *must rest for their weight as authority on the high character of the judge who delivered them, and not on that of the Court which decided the case.*" (Italics ours.)

In the case of *Pollock vs. Farmers Loan & Trust Co.*, 157 U. S., 576, Chief Justice Fuller said:

"Manifestly, as this Court is clothed with the power and entrusted with the duty to maintain the fundamental

law of the Constitution, the discharge of that power requires it not to extend any decision upon a Constitutional question if it is convinced that error in principle might supervene."

It is well settled that a case is not an authority on a point, which passes *sub silentio*, not being argued or discussed. The doctrine of *stare decisis* properly applies only when points are necessarily involved, actually raised, argued and intentionally decided by the Court.

United States vs. More, 3 Cranch, 159, 172;  
Buel vs. Van Ness, 8 Wheaton, 312, 321-322;  
New vs. Oklahoma, 195 U. S., 252.

We submit that an examination of the facts in *Neal vs. Delaware* will demonstrate that the actual decision in that case does not involve any point under the Fifteenth Amendment. The facts were as follows:

In May, 1880, a negro, Neal, was indicted for rape in a Delaware State Court. The Supreme Court of the United States had decided, about a year before, that the Fourteenth Amendment would invalidate any State law by which jurors were required to be white men. *Strauder vs. West Virginia*, 100 U. S., 303. Neal applied for a removal to the Circuit Court of the United States, under a statute which, as construed by the Supreme Court, gave a right of removal whenever the laws of the State denied him a right secured by the Fourteenth Amendment. Neal's contention was that the laws of Delaware required jurors to be voters and that the Delaware Constitution required voters to be "free white male citizens," so that in effect the laws of the State by their terms excluded negroes from the juries. The Delaware Court refused this application for removal. Neal then filed a motion to quash the indictment on the ground that while the laws might not discriminate against negroes in the drawing of juries, yet in fact in their administration negroes had been excluded from the Grand Jury finding the indictment solely on account of their race and color. This

motion was likewise overruled. A trial was had resulting in a conviction, and sentence of death. A writ of error was sued out from the Supreme Court of the United States on two grounds: (1) that the Court below erred in refusing the application for a removal, and (2) that error was committed in overruling the motion to quash the indictment.

The Supreme Court of the United States, in an opinion delivered by Mr. Justice Harlan, sustained the latter of these contentions, on the ground that the allegations of the motion to quash, which was under oath, not having been denied by the State on the face of the record, must be taken as true, and hence negroes having in fact been arbitrarily excluded from the grand jury solely on account of their race, the indictment ought to have been quashed under the Fourteenth Amendment. Hence the judgment was reversed. In this ruling of the Supreme Court, it will not be claimed, even by the other side, that the Fifteenth Amendment was in any way involved.

But the Court also held that no error had been committed in refusing the petition for removal. In substance, the decision was that a removal was not justified because the letter of the law might still require jurors to be white men, but that the Courts would assume that the State treated any laws in plain conflict with the federal Constitution as a dead letter. The Court said:

"The presumption should be indulged, in the first instance, that the State recognizes, as is its plain duty, an amendment of the Federal Constitution, from the time of its adoption, as binding on all of its citizens and every department of its government, and to be enforced within its limits, without reference to any inconsistent provisions in its own Constitution or statutes." 103 U. S., 389-390.

It is true Mr. Justice Harlan stated, that the Fifteenth Amendment eliminated the word "white" from the suffrage clause of the State Constitution, and that "thence-

forward the statute which prescribed the qualification of jurors was, itself, enlarged in its operation, so as to embrace all who by the State Constitution, as modified by the Supreme law of the land were qualified to vote at a general election."

But we submit that these remarks were unnecessary to the decision because, for one thing, even if the word "white" was not eliminated by the Fifteenth Amendment from the suffrage clause as a qualification for voters, it was eliminated by the Fourteenth Amendment *so far as that clause was incorporated into the jury law as a qualification for jurors*. Even if the Fifteenth Amendment did not entitle negroes to be voters, the Fourteenth Amendment entitled them to be jurors; and there was the same presumption that the State would recognize this provision of the Fourteenth Amendment as there was that it would recognize the provisions of the Fifteenth Amendment. Indeed, the presumption was stronger with respect to the Fourteenth than with respect to the Fifteenth Amendment; for there was no judicial decision that the Fifteenth Amendment eliminated the word "white" as a qualification of voters, but there was a flat decision by the highest Court in the land, Fourteenth Amendment eliminated the word as a qualification namely, *Strauder vs. West Virginia*, 100 U. S., 303, that the of jurors.

A simple test is to suppose that the Fifteenth Amendment had never been passed when *Neal vs. Delaware* arose. We should then have had a jury law in force which according to its letter required jurors to be white men; but we should also have had a decision of the Supreme Court of the United States, decided the year before the Neal case originated, holding that the word "white" was by the Fourteenth Amendment eliminated. The presumption would have been indulged that the Delaware authorities, recognizing the binding effect of the Fourteenth Amendment as construed by the Court of last resort, eliminated the word "white" from the

jury law. The State Court would have said, as in fact it did say:

“Returning to the point—that our laws forbid the selection of colored persons as jurors. We answer this by saying that we have no such laws. \* \* \* The Fourteenth Amendment, therefore, and the Act of 1875 passed by Congress as appropriate legislation for its enforcement, or either, are superior to our States Constitution, and it had to give way to them, and it did so give way, and was repealed.” 103 U. S., 390.

It is true that in *Strauder vs. West Virginia*, 100 U. S., 303, the Court held that an application for removal ought to have been granted where a State statute required jurors to be white men; but up to that case, there had been no judicial decision that the Fourteenth Amendment forbade laws excluding negroes from juries, and moreover, the statute involved in that case requiring jurors to be white men was passed after the Fourteenth Amendment. But when *Neal vs. Delaware* arose, the decision in *Strauder vs. West Virginia* had been rendered, and it was accepted law that the word “white,” by the force of the Fourteenth Amendment, was eliminated from all State statute fixing the qualifications as jurors, and there had been no Act of the Delaware Legislature since the Fourteenth Amendment reaffirming the word “white” in that connection. The presumption was therefore that Delaware recognized the word as stricken out of its jury law whether or not it still remained in the suffrage clause of the Constitution.

In addition to this, the case of *Neal vs. Delaware* came up on a writ of error to a State Court, and it is familiar law that in all such cases the Supreme Court takes the law of the State as enunciated by the State Court, and merely determines whether there is anything in that law, so construed, in conflict with the Constitution of the United States. Now the Delaware State Court had declared with emphasis that the law of Delaware permitted negroes to vote; and the Supreme Court, therefore, had

*to accept this as the law of that State.* How the Delaware Court came to reach that conclusion was no affair of the Supreme Court in this case. There was no pretension that the Federal Constitution *forbade* Delaware to allow negroes to vote, and, therefore, the Supreme Court could not go behind the authoritative declaration of the Delaware Judges that the law of that State did in fact allow them to vote. To the Supreme Court of the United States, it made no difference how the Delaware Court reached that conclusion. For the Supreme Court, it was sufficient that the Delaware Court declared that by the law of Delaware negroes were qualified voters, so that the requirement that jurors should be voters did not exclude negroes from the juries.

For these reasons, we submit that the remarks of Mr. Justice Harlan in *Neal vs. Delaware* respecting the Fifteenth Amendment were *obiter dicta*, unnecessary to the decision of the case before the Court. As such they are, of course, not binding upon this Court.

In addition to all this, however, and perhaps more important than all the questions as to the validity of the Fifteenth Amendment or its application to its right of voting at State or Municipal elections was not raised or considered or consciously adjudicated by this Court in that case. It passed absolutely *sub silentio* 10

With the case of *Neal vs. Delaware* disposed of there is no other case in the Supreme Court that we believe it will even be contended approaches a decision of the present question. Practically all of the cases in which there is any language used giving the Fifteenth Amendment any broader operation than that contended for here, decided either one of two questions:

1. That certain statutes passed to enforce the Fifteenth Amendment were void because they attempted to reach *individual* action in connection with the State elections.

2. That certain statutes passed to enforce the Fif-

teenth Amendment were sustainable upon the ground that they did not cover any elections other than Congressional elections, the regulation of which was within the power of Congress.

Ex Parte Yarbrough, 110 U. S., 651;

James vs. Bowman, 190 U. S., 127;

U. S. Reese, 92 U. S., 214;

U. S. vs. Crinkshank, 92 U. S., 542.

It is perfectly apparent that in neither class of cases could the Court by any possibility decide the question involved here. They are all perfectly consistent with the contention here made.

In the first class of cases the Court said that Congress had no control over individual action at State elections, while here we merely go farther and say that it has no control over either individual or State action, in so far as State elections are concerned.

With regard to the second class of cases they merely decide that which is not disputed in this brief—that Congressional elections are subject to Congressional control, because they have their bases in the Federal Constitution.

One thing more:

Mr. Justice Miller, in his great opinion in the Slaughter House cases, 16 Wal., 78, said:

“The argument we admit is not always the most conclusive which is drawn from the *consequences* urged against the adoption of a particular construction of an instrument. But when as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State government by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal Govern-

ments to each other, and both of these governments to the people, the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt.

“We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the Legislatures of the States which ratified them.”

These words were uttered in the year 1872, but seven years from the close of the Civil War, and in a case where it was only argued that the fundamental civil rights of the citizens of the States were brought within the protection of the Fourteenth Amendment. If the contemplation of the consequences that would follow the adoption of that construction appalled the judicial mind and compelled the decision which was rendered rejecting it, with what answer would that Court have met the suggestion that the three war amendments not only fettered and degraded the State Governments in so far as the civil rights of their citizens were in their keeping, but that they struck to the foundation of every sovereign State in the Union and absolutely destroyed its political integrity by subjecting its most essential and vital power—the *power to determine its own electorate*—to the will of the National Government.

(See proposition V, Page 98, of this brief.)

#### IV.

THAT ALLOWING THE BROADEST POSSIBLE CONSTRUCTION, THE RIGHT OF CITIZENS OF THE UNITED STATES TO VOTE MENTIONED IN THE FIFTEENTH AMENDMENT, WHICH THE STATES ARE THEREBY PROHIBITED FROM DENYING OR ABRIDGING ON ACCOUNT OF RACE, COLOR OR PREVIOUS CONDITION OF SERVITUDE, IS THE RIGHT TO VOTE AT ELECTIONS OF A PUBLIC GENERAL CHARACTER,

AND DOES NOT INCLUDE THE RIGHT TO VOTE IN CORPORATE BODIES CREATED SOLELY BY LEGISLATIVE WILL AND WHEREIN SUCH RIGHT IS DEPENDENT ALTOGETHER UPON LEGISLATIVE DISCRETION AS IN MUNICIPAL CORPORATIONS.

Passing now from the argument that the Fifteenth Amendment only protects from abridgment, etc., the right to vote which citizens of the United States have by virtue of such citizenship, and granting for the purpose of the present discussion that its scope is sufficient to include State elections, we come to the question: Whether it also covers mere *municipal* elections within a State?

In reading the language of the Fifteenth Amendment one inquiry is immediately suggested. What is meant by *the right to vote*? Giving the language all possible scope, it will be seen that there must be a point which divides the right to vote from other rights. Voting is a thing common among men, both in their public and private affairs. They vote as members of the Legislatures, as stockholders in railroad corporations, as members of churches; clearly the right to vote in these several capacities is not the right mentioned in the Fifteenth Amendment.

In a large number of the States a similar question has arisen with regard to the extent of the right to vote conferred by their Constitutions. Leaving other cases aside which only indirectly bear upon the question here, we will cite a number of decisions for the purpose of showing that, no matter how broad may be the language by which the right of suffrage is conferred, it is never regarded as embracing the right to vote at a *municipal election* unless these elections are expressly mentioned or the intention to include them is made manifest by the strongest implication.

The reason of this is clear. Where municipal corporations are created solely by legislative will and do not

have their existence in the organic law itself, they are subject absolutely to legislative control. They are but *agencies* established by the Legislature to do the things it directs in the way and manner it prescribes. Where this is the origin and purpose of a particular municipal corporation, to say that any general right to vote necessarily gives the right to vote upon matters appertaining to the corporation is tantamount to saying that such right to vote carries the elector into the legislative body itself and gives him the right to vote upon all questions arising therein.

All of these authorities will show that even where the right to vote is given in the broadest possible terms by the State Constitution, this right thus given does not confer the privilege of voting at municipal elections created solely by the Legislature.

This being true, it can hardly be claimed that the general language of the Fifteenth Amendment to the Constitution can have any broader effect. We are now dealing with a question of construction, and if a practically uniform construction of language identical so far as the present discussion is concerned with that of the Fifteenth Amendment can be shown, such construction ought to be conclusive of the meaning of the amendment itself.

In *Mayor vs. Shattuck*, 19 Colo., 111, a question closely analogous arose. The Constitution of that State contained the following provision: "Sec. 1. Every male person over the age of twenty-one years possessing the following qualifications shall be entitled *to vote at all elections.*"

The Constitution then proceeded to set out the qualifications. The question arose in the case above cited as to whether the Legislature could change the Constitutional qualifications in a municipal election upon the question as to whether a certain portion of territory should be annexed to the municipality. The Legislature in providing for this election had fixed a property qualification, in

addition to those mentioned in the Constitution of the State. The Court said:

"It will be observed that no property qualification is specified in the foregoing section; hence, if an elector has the qualifications therein specified he is entitled to vote at all elections contemplated by said section. If the term elections, as therein used, be held to include such an election as provided for in the Act now under consideration, then the Act cannot be upheld. That the word is not used in such a comprehensive sense may be inferred from the fact that elsewhere in the Constitution, wherein the creation of public indebtedness is provided for, the right to vote is restricted to such qualified electors as shall in the next year preceding have paid a property tax. See Article II, Secs. 6, 7, 8. These provisions of Article II were framed at the same time as Article 7, and if they had been considered exceptions, they would doubtless have been voted as such in Article 7 by the usual phrase 'except as in this Constitution otherwise provided,' as was done in other parts of the original Constitution. See Art. 5, Sec. 30; Art. 6, Secs. 1 and 2.

"It is manifest that some restriction must be placed upon the phrase *all elections*, as used in Section 1, else every person having the qualifications therein prescribed might insist upon voting at every election, private as well as public, and thus interfere with affairs of others in which he has no interest or concern. In our opinion the word *elections* thus used, does not have its general or comprehensive signification, including all acts of *voting*, *choice*, or *selection*, without limitation, but is used in a more restricted political sense—as elections of public officers."

The Court then proceeds to decide that the election in question, being entirely dependent upon the legislative will, was not within the term "all elections" used in the State Constitution.

In *State vs. Monahan*, 72 Kan., 492, decided in 1905,

will be found a valuable collection and review of the authorities upon this question.

Section 7 of the Bill of Rights of the State of Kansas is as follows:

“No religious test or property qualifications shall be required for any office of public trust, nor for any vote at any election.”

By Act of the Legislature of Kansas certain public corporations, known as drainage districts, were created, having power to take certain measures for the protection of property within their boundaries against injury from the overflow of natural water courses; this power exercised by a board of directors chosen by the residents *tax-payers*, who are authorized to call elections to vote upon propositions to issue bonds, to meet the cost of any improvements undertaken.

The question involved in the case was, whether this statute fixing a property qualification for voting at the particular election provided for was in conflict with the provisions of the Bill of Rights above quoted. After referring to the language of the Bill of Rights, the Court said:

“Manifestly it is not necessary to construe this *literally* as applying to every election whatsoever. It doubtless would not be contended that the sentence relates to the election of the officers of a private corporation, although that is a matter over which the Legislature exercises some control.” Page 496.

“The elections referred to in the Act under consideration *were not provided for by the Constitution*, nor did the Constitution impose upon the Legislature any duty to make provision for them. They were not required to be held by reason of anything contained in the fundamental law of the State. The drainage district in question is *wholly the creation of the Legislature*, which had practically unlimited discretion in the matter. The stat-

ute might have made the office of director appointive instead of elective, and might have made the issuance of bonds dependent upon the will of the taxpayers as indicated by petition instead of by vote. That the selection of the officers who act for the corporation is decided by the usual electoral machinery, but by a restricted electorate, and that the concurrence of the taxpayers in a bonding proposition is expressed by means of an election, rather than by some other method, do not bring the case within the reason or within the true meaning of the clause of the Constitution relied on by the plaintiff. The elections held to choose officers of a drainage district or to pass upon the expending of proposed improvements designed for protection against floods are not *merely other elections than those provided for in the Constitution; they are of a different character from any therein referred to*, and so far dissimilar in their nature that it cannot be supposed that they are within the contemplation of the Constitutional convention when the qualification of electors were under consideration."

The same principle is announced in the case of Leflore County vs. State, 70 Miss, 769. The Mississippi Legislature enacted a stock law which was to become effective in each county upon being approved at a local election, to be participated in by voters having qualifications entirely different from those prescribed for electors by the Constitution. The statute was attacked upon the ground that it sought to establish a property qualification for voting and to extend the right of suffrage to persons barred from its exercise by the Constitution.

The Court said:

"The provisions of the Constitution as to qualified electors, and registering elector, and the election ordinance adopted by the Constitutional convention have been appealed to as rendering unconstitutional the provisions of the code as to a stock law. We reject this view. There is nothing in the Constitution or ordinances at war with the stock law. The Legislature might pass

a stock law for one or all of the counties *without a vote of the people on the subject. It might empower each board of supervisors to declare such law in force, without vote or petition of the people, and having plenary power over the subject, was authorized to prescribe the conditions on which the boards might act.*"

In *Buckner vs. Gordon*, 81 Ky., 671, the legislature had fixed different qualifications for voters at a municipal election from those in the State Constitution. In holding this legislation valid the Court said:

"Towns and cities, with all their machinery of Government, are the creatures of legislative will, as has been repeatedly held by this Court. *The power to create carries with it the power to destroy, and the power to destroy necessarily implies the power to regulate.*"

The above quotations are selected from a large number of cases which establish indisputably *that the right to vote at a municipal election is not included in the general right to vote.*

In some of the cases it will be observed the language of the Constitutions was that persons possessing certain qualifications should have the "right to vote at all elections;" in others there were provisions prohibiting the imposition of certain qualifications for voting, but as to both provisions it is held that they do not apply to the right to vote at municipal elections.

As this case involves the right to vote at a municipal election in Maryland, it is of the first importance, of course, to see what right citizens of *Maryland* have to vote at such an election. This is settled by the case of *Hanna vs. Young*, 84 Maryland, 179, one of the leading cases upon the subject here under discussion. This case involved the validity of an Act of the General Assembly of Maryland imposing a property qualification upon electors voting at municipal elections in the town of Bel Air.

The following quotation from the opinion shows the

questions raised in the case and decided by the Court of Appeals:

“The question lies within very circumscribed limits, but it is nevertheless a question which has not heretofore been passed upon by this tribunal. Whilst it has received consideration in some of the Courts of the other States of the Union, it does not, however, appear to have been determined except in a very limited number of cases. The contention here is that the 30th Section of the Act of 1896 is directly in conflict with the provisions of Art. 1, Sec. 1, of the Constitution of the State, which reads as follows: ‘All elections shall be by ballot and every male citizen of the United States of the age of twenty-one years or upwards, who has been a resident of the State for one year, and of the Legislative District of Baltimore City or of the county in which he may offer to vote, for six months next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections hereafter to be held in this State.’

“It is contended on the part of the appellant that this section of the Constitution plainly comprehends and includes within its express terms, *all elections*, whether State or Federal, county or municipal. Yet there is but one municipality mentioned in this section of the organic law, and in fact, Baltimore City is the only municipality mentioned *eo nomine* in any part of the Constitution. The Court, in *Smith vs. Stephen*, 66 Md., 381, Mr. Justice Bryan delivering the opinion of the Court, said: ‘It is sufficient to say that no municipal elections, except those held in the City of Baltimore, are within the terms or meaning of the Constitution.’ Whilst the Constitution, Art. 3, Sec. 48, authorizes and empowers the General Assembly to create corporations for municipal purposes, it nowhere prohibits the Legislature from imposing upon the qualified voters residing within the corporate limits of a town, any reasonable restrictions it may deem proper when seeking the exercise of the right of elective franchise, in the selection of its officers. In this respect the

power of the Legislature is unlimited. The argument advanced at the hearing in this Court is to the effect that the Act in question is void because the Constitution has conferred the right and prescribed the qualifications of all electors in this State, the Legislature is without authority to change or add to them in any manner. If the premises of this contention were correctly stated, the argument and sequence would undoubtedly be correct. But, as already observed, the Constitution (Art. 3, Sec. 48) only in general terms authorizes the creation of corporations for *municipal purposes*, and leaves to the Legislature the enactment of such details as it may deem proper in the management of the concerns of the corporation, or which may be regarded as beneficial in the government of the same. The Constitution of this State provides for the creation of certain offices, State and county, which are filled either by election or by appointment; and we regard it as an unreasonable inference to suppose that municipal elections held within the State (outside the corporate limits of Baltimore City), can be properly termed elections under the Constitution, such as State and county elections; or that the framers of the Constitution ever contemplated that Art. 1, Sec. 1, of that instrument was intended to apply to municipal elections, such as the one now under consideration, which is the mere creature of statutory enactment. In the creation of a new municipality the Constitution devolves upon the General Assembly the entire duty of giving vitality to and of organizing and fostering the body corporate without any other Constitutional regulation than the mandate to provide for the system itself. It is, therefore, the mere creature of legislative sanction and the subject of statutory regulation.

“It is only at elections which the Constitution itself requires to be held, or which the Legislature under the mandate of the Constitution makes provision for, that persons having the qualifications set forth in said Section 1, Art. 1, are by the Constitution of the State declared electors. Nowhere in the Constitution are the govern-

ments of municipalities in this State, or their officials, either clothed with power or designated as any part of our State government, but their very creation together with all their powers and attributes which attach to their management, are lodged by the Constitution with the legislative department of our State government, save in some respects in the City of Baltimore." Pages 181-183.

The Court then proceeds to review the authorities and concludes with the quotation from the opinion of the Court in the case of *Mayor vs. Shattuck*, before set out in this brief.

Here is an express decision, that the right to participate in a municipal election held solely under the sanction of the Legislature of Maryland, is not included in the right given by the provision of the State Constitution that "every male citizen of the United States, of the age of twenty-one years, or upwards, \* \* \* shall be entitled to vote in the ward or election district in which he resides, at *all elections* hereafter to be held in this State."

By no possible construction can the Fifteenth Amendment be of broader scope than the language of the Constitution of Maryland, and we have seen that the effect of the decision quoted is, that no matter how broad the land-disclose, the Courts have followed the view expressed in does not embrace a purely municipal election.

With only a single exception, so far as our researches disclose, the Courts have followed the view expressed in the cases before cited.

In all the following cases will be found instructive discussions of this question:

- State, ex rel. Atty. General vs. Dillon, 32 Fla., 545;
- Plummer vs. Yost, 144 Ill., 68, 19 L. R. A., 110;
- Belles vs. Burr, 76 Mich., 1;
- Spitzen vs. Village of Fulton, 172 N. Y., 285;
- Harris vs. Burr, 32 Ore., 348;
- Setterlun vs. Keene, 48 Ore., 520;
- Landis vs. School District No. 44, 57 N. J. L., 510.

See especially *Willis vs. Kalmbach*, 64 S. E. (Va.), 342, decided 1909, which contains a full review of all the cases.

In order to avoid any confusion with regard to the authorities upon this proposition it is proper to refer to several other cases which may possibly be cited upon behalf of plaintiffs.

There are several cases construing State Constitutions which have held municipal elections to be within the provisions of the Constitutions construed, fixing the qualifications of electors. But in every one of these cases with a solitary exception, the Court has based its opinion upon the ground that municipal elections were by other provisions of the Constitution expressly declared to be within the provision fixing the qualifications.

These cases, therefore, clearly do not conflict with the long line of other cases already cited, or bear upon the case at bar, because they clearly recognize that in order to bring a municipal election within the provision of a Constitution fixing the right to vote, there must be some express language requiring it. And in nearly all of the States where such cases will be found, there are other cases which uphold the exact proposition now contended for.

Thus in *Allison vs. Blake*, 57 N. J. L., 6, the Court held that where the Constitution provided that all persons with certain specified qualification should be entitled to vote for *all officers elective by the people*, the Legislative could not add a property qualification to those fixed by the Constitution in order to entitle such electors to vote for a road commissioner, *which officer was made elective by the Constitution itself*.

A latter case in the very same volume, *Landis vs. School District*, 57 N. J. L., 509, was decided in exact accordance with the case before quoted from and held that where the election provided for was purely of legislative sanction the qualifications fixed in the Constitution did not govern.

In the following States in the first case cited the Court ruled that the Constitution did apply because expressly made to do so, and in the second, that no express mention being made of municipal elections, they were not covered.

## OREGON.

Levesley vs. Litchfield, 47 Or., 254;  
 Setterlun vs. Keene, 48 Or., 520;  
 (See also Harris vs. Burr, 32 Or., 348; 39 L. R.  
 A., 768.)

## NEW YORK.

Mattee vs. Gage, 141 N. Y., 112;  
 Spitzen vs. Village of Fulton, 172 N. Y., 285;

## MICHIGAN.

Coffin vs. Election Officers, 97 Mich., 188;  
 Belles vs. Burr, 76 Mich., 1;

## ILLINOIS.

People vs. English, 139 Ill., 622;  
 Plummer vs. Yost, 144 Ill., 68.

In Wisconsin there are three cases holding that Constitutional qualifications apply to municipal elections, but upon the ground that municipal elections are expressly included.

State vs. Cornish, 53 Wis., 45;  
 State vs. Williams, 5 Wis., 308;  
 State vs. Lean, 9 Wis., 279.

The case of *People vs. Canaday*, 73 N. C., 198, is the case we have referred to as being the single exception in the authorities upon the proposition here contended for.

This case has been discussed and distinguished in several cases, but as the authority against it is so overwhelming we do not think it necessary to discuss it here.

See, however, *State vs. Dillon*, 32 Fla., 545.

After this full review of the authorities establishing as

they do a uniform construction of the term "right to vote" can there be any dispute as to what these words in the Fifteenth Amendment are to be taken to mean.

We have seen that language even more inclusive and comprehensive has been held not to apply to such an election as the one involved in the present cases, and it was so decided it is important to remember upon the ground that the mere right to participate in a municipal election is not *in reality a right to vote at all*.

It will, therefore, not do to answer that these cases do not apply because although so far as a State is concerned it may not be right to vote under its Constitution, still as the Legislature of the State, acting for the State, has given the right to vote at these municipal elections, the Fifteenth Amendment operating upon the State, and all exercise of State power, prohibits its Legislature from giving the right to vote when the provisions of the Amendment are not observed.

This answer would overlook entirely the meaning and effect of all the decisions, because they hold that what the Legislature is giving in such a case is not a right to vote within any ordinary meaning of that term. And the principle of such an answer would likewise prevent the Legislature from granting any purely private charter when voting is mentioned, without observing the provisions of the Amendment. We are sure no such argument will be attempted.

Much light is thrown upon this question by the Fourteenth Amendment. The second section thereof provides:

"Representatives shall be apportioned among the several States according to their respective numbers counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or

members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

Undoubtedly it was meant by this section of the Fourteenth Amendment to penalize any State by a reduction of its representation, whenever it denied to any of the male inhabitants mentioned, the exercise of what is ordinarily understood as the exercise of the right to vote. The evident purpose of the enumeration was to exhaust this entire right as ordinarily understood so that there could be no doubt about what was meant. We submit that no authority can be found which will have the effect of adding any other offices to those mentioned in the Section 2 as being comprehended within the "right to vote" when ordinarily spoken of.

Although it is true that the Fourteenth and Fifteenth Amendments have different purposes and therefore the construction must to some extent differ, yet we submit that in any view the Fourteenth Amendment must be taken as embracing the utmost conceivable limit of the scope of the Fifteenth Amendment because it undoubtedly attempted to enumerate the elections embraced in the "right to vote" in its ordinary sense.

This is the view expressed in a very recent case, dealing with the same question as that involved in the cases we have quoted from.

In *Willis vs. Kalmbach*, 64 S. E., 342, the question arose whether the provision in the Virginia Constitution that, "In all elections held after this Constitution goes into effect the qualifications of electors shall be those required by Article two of this Constitution," applied to a Local Option election.

The Court held that it did not. In discussing the scope of the Fifteenth Amendment the Court said:

"The Fifteenth Amendment declared that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.'

"We think it may fairly be said that the Fifteenth Amendment intended to secure the right of citizens to vote in the elections enumerated in the Fourteenth Amendment; that with respect to the right of suffrage, the two amendments cover and embrace the same objects.

"These amendments imposed the only limitations that existed upon the power of the convention to deal with the question of suffrage, and certainly the Fourteenth Amendment never contemplated such as we are now considering." Page 346.

It is proper to add that the case of *Howell vs. Pate*, 119 Ga., 537, is apparently adverse to the contention here made. As that case is only reported by head notes, it is not clear upon what ground the decision was placed. The case is, therefore, entitled to little weight.

It may be urged, however, that some of the statutes passed to enforce the Fifteenth Amendment show a contemporaneous construction of the Amendment in favor of the plaintiff.

Considering the long line of cases holding these statutes unconstitutional, we think it might be urged with a good deal of force that such contemporaneous construction is at least *prima facie* erroneous.

But we rest upon the great volume of authority upon this question supporting the proposition announced at the beginning of the discussion, which we submit can never be overborne by any mere declaration of the legislative branch of the Government.

## V

IF CONSTRUED TO HAVE REFERENCE TO VOTING AT STATE OR MUNICIPAL ELECTIONS, THE FIFTEENTH AMENDMENT WOULD BE BEYOND THE AMENDING POWER CONFERRED UPON THREE-FOURTHS OF THE STATES BY ARTICLE V OF THE CONSTITUTION, AND, THEREFORE, THE AMENDMENT SHOULD NOT RECEIVE THAT CONSTRUCTION, IF IT IS FAIRLY OPEN TO A MORE LIMITED CONSTRUCTION.

It is well settled, of course, that if an Act of Congress be fairly open to two constructions, according to one of which it would be constitutional, and according to the other, unconstitutional, the former construction will be adopted.

“It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, its our plain duty to adopt that construction which will save the statute from constitutional infirmity.

Knights Templar Indemnity Co. vs. Jarman,  
187 U. S., 197, 205.

“And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”

U. S. vs. Delaware & Hudson Co., 213 U. S., 407.

So, it will be contended that if the Fifteenth Amendment is fairly open to two constructions, according to the one of which it would be constitutional, that is to say, within the scope of the amending power conferred upon the States by the Constitution, and according to the other of which it would be unconstitutional, in that it would be an excess of said power, the former construction must be adopted.

The power to amend does not include the right or the power to destroy the thing to be amended, i. e., the Federal Union.

If it can be shown that in adopting an amendment like the Fifteenth, when construed as applicable to State elections, the States, or rather three-fourths of them, are undertaking to exercise a power which is in its nature without limit, and which, if carried to its natural limit, would result in depriving any State of a function or power essential to its continued existence as a State within the meaning of the Constitution, and thus in effect destroy the State, then we shall contend that the Fifteenth Amendment as thus construed must be deemed not to have been within the scope of the amending power intended to be conferred upon three-fourths of the State by the people in the adoption of the Federal Constitution, and for that reason void.

Now, it is submitted that the right to regulate the exercise of the elective franchise at its own elections, to determine for itself who shall constitute its electorate, is one of the "functions essential to the existence of a State," that is to say, the kind of State which is contemplated by the Constitution. A political body not possessing that right would not be a State within the meaning of the Constitution. Certainly it would not be an "indestructible State."

If the other States, three-fourths or any number of them, or any other outside authority, has the right without its consent to regulate in any way the right of suffrage in any State—to determine who shall vote or who shall

not vote at State elections, by prohibiting a State from prescribing such qualifications or conditions for the exercise of the suffrage as it may deem necessary for its own welfare and for the protection of the personal and property rights of its citizens, then such a "State" holds its existence entirely at the mercy of such outside power or authority. It is a mere province or dependency whose government may at any time be turned over to such persons or such *person* as the outside authority may choose to clothe with the right of suffrage at State elections and thus with all political power.

The right to regulate the conditions upon which the elective franchise may be exercised is in its nature without limit. If the right of a State to regulate its own electorate at State elections may be restrained in one respect, it may be restrained or controlled in all; or it may be taken away altogether. Thus the State may be reduced to the condition of a mere province or dependency, with no autonomy whatever. In other words, it would cease to exist as a State within the meaning of the Federal Constitution.

But the destruction of the State means the destruction of the United States, for "without the States in union there can be no such political body as the United States." 7 Wall., *infra*.

It is not conceivable that the people of the United States, when they conferred upon three-fourths of the States the right to amend the Constitution, intended to confer any such power as that, as we shall presently endeavor to show. The primary purpose and object which the people had in establishing the Constitution was to create a Federal Union, which should be *perpetual*, and the power to *destroy* that union, either by secession or in any other way, was never intended to be conferred on the States by the people.

Any amendment, so called, whereby that purpose would be defeated, could never have been within the power intended to be conferred by the people; for it must always

be borne in mind *the States themselves possess no inherent right or power whatever to amend the Federal Constitution—i. e., the Constitution of the United States.*

Prior to the Civil War the doctrine of the extreme States Rights Party was that the Federal Government—the political body known as the United States—had been the result of a *compact* between the States—that it was a creation of the States—that *the States* adopted and ordained the Constitution, and thereby created the United States as a body politic distinct from the States. Few will now be so illiberal as to deny that this doctrine was advocated with the utmost sincerity by many able and patriotic men of those days, or that if the question were an open one at this time, many powerful arguments, historical and otherwise, might be adduced in its support. But that question is not an open one now. It is one of the questions which was submitted to the arbitrament arms and finally decided at Appomattox.

Furthermore, the judgment there rendered has been ratified and confirmed by the Supreme Court of the United States, and that judgment is that the Constitution of the United States was adopted and established, *not by the States, but by the people.*

Hence, it should follow that the States, not having created or made the Constituion, have no power to change or amend it, except in so far as the power so to do has been conferred upon them by the people in the Constitution itself.

In the decisions of the Supreme Court rendered since the Civil War will be found the clearest exposition of this matter.

Texas vs. White, 7 Wallace, 700.

This case turned upon the question as to whether Texas, after its attempted separation from the Union, was still a State and required an examination of the question as to what constitutes a "State" within the meaning of the

Federal Constitution, in the course of which examination the Court said:

"If, therefore, it is true that the State of Texas was not at the time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it." (P. 719.)

\* \* \* \*

"Some not unimportant aid, however, in ascertaining the true sense of the Constitution, may be derived from considering what is the correct idea of a State, apart from any union or confederation with other States. The poverty of language often compels the employment of terms in quite different specifications; and of this hardly any example more signal is to be found than in the use of the word we are now considering. It would serve no useful purpose to attempt an enumeration of all the various senses in which it is used. A few only need be noticed."

"It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country often it denotes only the country or territorial region inhabited by such a community; not infrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory and government."

"It is not difficult to see that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government or united by looser and less definite relations, constitutes the State."

\* \* \* \*

"In the Constitution the term State most frequently expresses the combined idea just noticed, of people, territory and government. A State, in the ordinary sense of the

Constitution, is a *political* community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written Constitution, and established by the consent of the governed. It is the union of *such* States, under a common Constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and States which compose it one people and one country." (Pages 720-721.)

\* \* \*

"The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared to be *perpetual*.' And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a *perpetual* Union, made more *perfect*, is not?"

"But the perpetuity and indissolubility of the Union by no means implies the loss of distant and individual existence, or of the right of self-government by the States. Under the articles of Confederation each State retained its sovereignty, freedom and independence, and every power, jurisdiction and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States, respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with

*all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.'\** Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union, under the Constitution, but it may be not unreasonably said that the *preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government.* The Constitution, in all its provisions, look to an *indestructible Union composed of indestructible States.*" (Pages 724-725.) (Italics ours.)

In this exposition of the nature of the Federal Union the Supreme Court was but reaffirming the doctrine which it had announced and declared in the prior case of

Lane County vs. Oregon, 7 Wallace 71.

In that case it was held that an Act of Congress requiring the State to accept legal tender notes of the United States in payment of State taxes was void, if construed to have that effect, for the reason that the taxing power was essential to the existence of the State as a separate and independant sovereignty, the Court saying:

"The people of the United States constitute one nation, under one Government, and this Government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own Government, and endowed with *all the functions essential to separate and independent existence.* The State disunited might continue to exist. Without the States in union there could be no such political body as the United States." (Italics ours.)

\* \* \* \*

"Now, to the existence of the States, themselves neces-

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\*Lane vs. Oregon, 7 Wall., 79.

sary to the existence of the United States, the power of taxation is indispensable. It is an essential function of Government. \* \* \* If, therefore, the condition of any State, in the judgment of its Legislature, requires the collection of taxes in kind, that is to say, by the delivery to the proper officers of a certain proportion of products, or in gold and silver bullion, or in gold and silver coin, it is not easy to see upon what principle the National Legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered. If this be so, it is certainly a reasonable conclusion that Congress did not intend, by the general terms of the currency Acts, to restrain the exercise of this power in the manner shown by the statutes of Oregon." (Page 76-78.)

So, in the case at bar, if the right to regulate its own electorate in State elections is one of the powers essential to "separate and independent existence" of a State, and the very purpose expressed, the avowed purpose which the people had in establishing the Constitution was to insure *perpetuity* in the Federal Union, a union "*composed of States thus constituted*," then is it not "a reasonable conclusion" that neither Congress, which adopted the Fifteenth Amendment, nor the States which ratified it, intended "by the general terms" employed in it to restrain the exercise of this power essential to the perpetuity of the Union as to the perpetuity of the States?

It must, therefore, be manifest that the purpose which the people of this country had in view when they adopted, first the Articles of Confederation, and subsequently the present Constitution, was, as expressed in the preambles to those instruments, the formation not merely of a Union, but a "perpetual Union" of such State, and, of course the Union could not be perpetual unless the States which constituted it were to be also perpetual and indestructible. True, the terms of the Union—the Federal Government—set forth in the Constitution were

made subject to amendment by the States by a three-fourths vote. The powers of the Federal Government on the one hand or of the State Government on the other might be enlarged or diminished from time to time. The amending power was made as broad as possible (although with one important express limitation to be hereafter mentioned), but it was a power to *amend*, not to *destroy*, the Union.

Therefore, it is manifest that no power or right was intended to be given, under the guise of an amendment, to deprive the States of any "function essential to separate and independent existence." For that would be to put an end to the Union; to destroy the United States, which "without the *States* in union could not exist." *How can it be said that the people intended to establish a PERPETUAL union and at the same time—in the same breath—that they intended to confer upon any number of States the right to destroy it?*

The word "amend" is a word of broad significance. It may include all sorts of changes, in the shape of additions to or subtractions from the powers conferred upon the State or the Federal Governments, provided always those Governments, State or Federal, were not stripped of any "functions essential to separate and independent existence" as governments. Would any one contend, for instance, that by vote of the other States an "amendment" could be validly enacted, whereby the New England States were deprived of all power to levy taxes for the support of their State Governments? Or, to take another illustration: Suppose Congress should repeal the Chinese Exclusion Laws and remove all restrictions upon Japanese immigration. In a few years the Asiatics would outnumber the Caucasians in the Pacific States. Under the ruling of the Supreme Court in *Wong Kim Ark vs. U. S.*, 169 U. S., the children of these Asiatics born in this country would be citizens of the United States and of the States in which they resided. And if the Fifteenth Amendment were held to be applicable to

State and municipal elections, so that the people of those States were prohibited from denying them the right to vote at such elections because of their race, in a comparable short time these States would become Asiatic States. In the expressive language of Mr. Bret Harte, their "civilization" would be a "failure" and "the Caucasian played out."

The fact that the power of amendment contained in Article V of the Constitution is stated in general terms and with only one express limitation now in effect, (to wit, the prohibition against any amendment to deprive any State against equal suffrage in the Senate), by no means justifies the inference that other limitation upon the amending power may not be necessarily implied. This amending power is conferred by the Constitution upon the States, or three-fourths of them. The *taxing power*, which is conferred upon the Federal Government of the United States by Section 8 of Article 1 of the Constitution, is equally broad and general in its terms, if not more so; and yet, it has been uniformly held by the Supreme Court to be subject to certain limitation implied from the very nature of the government intended to be established by the American people in the adoption of the Federal Constitution; "Not," as an eminent writer puts it, "because the taxing power as quoted is not full and complete, but because this power must be construed in the light of the Constitution as a whole—its scope, purpose and design. The scope, purpose and design of the instrument are to create two separate, and within their granted and reserved powers, independent sovereignties. And it follows necessarily that neither should and that neither does have the power to embarrass or destroy the other. In other words, that there must always be subtracted from this unlimited taxing power, pleary though it be, the right of a State Government to exist and perform its function. Upon this principle alone the instrumentalities of the State are exempted." (Senator Borah in North American Review for June, 1910.)

And it was so held in the case of

The Collector vs. Day, 11 Wallace, 113.

In that case it was held that it was not competent for Congress, under the taxing power conferred upon the United States, to impose a tax upon the salary of a judicial officer of a State. Mr. Justice Nelson, in delivering the opinion of the Court (p. 123), discusses the necessary limitations of the taxing power in the manner in which we submit is equally applicable to the amending power, as follows:

"The cases of *McCulloch vs. Maryland* (4 Wheaton, 316), and *Weston vs. Charleston* (2 Peters, 449), were referred to as settling the principle that governed the case, namely, 'that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers.' "

"The soundness of this principle is happily illustrated by the Chief Justice in *McCulloch vs. Maryland*. 'If the States,' he observes, 'may tax one instrument employed by the government in the execution of its powers, they may tax any and every instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government.' 'This,' he observes, 'was not intended by the American people. They did not design to make their government dependent on the States.' (And it must be equally true, we submit, that the American people did not design to make any of the States dependent for their existence as republics—as States with a Republican form of government upon the will of any particular number of the States.) "Again, 'That the power of taxing it (the bank) by the States may be exercised so far as to destroy it, is too obvious to be denied.' " \* \* \* \* " 'If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. \* \* \* \* "

“ \* \* \* Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States.”

“ \* \* \* The Constitution guarantees to the States a Republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, *the general Government itself would disappear from the family of nations*, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. \* \* \* Without this power, and the exercise of it, we risk nothing in saying that no one of the States *under the form of government guaranteed by the Constitution* could long preserve its existence. A *despotic* government might.” (Pages 124-126.) (Italics ours.)

“ \* \* \* It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon *necessary implication*, and is upheld by the great law of *self-preservation*; as any government whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?”

Now, applying this reasoning to the cases at bar, we submit:

(a) That if the right to tax is "a right which in its nature acknowledges no limits," so the right to extend or limit the elective franchise in a State is equally a right which, in its nature, acknowledges no limits. If three-fourths of the States have a right under the amending power, or under pretense of exercising the amending power, to say that a State *shall not deny* or abridge the right to vote at State or Municipal elections of any man on account of his color or his race, they have an equal right to say that a State *shall deny* such persons the right to vote on account of their race or color, *or for any other reason*. The power that has a right to determine who shall and who shall not vote in a State has a right, in effect, to determine who shall govern the State—who shall be elected.

The Constitution provides that the United States "shall guarantee to every State a Republican form of government." Could a State which was subject to such outside control be deemed to have a Republican form of government? Is not the right of the people to select their own rulers of the essence of a Republican form of government? Do we "risk anything in saying" that "without this power," that is, the power to regulate its own electorate, "no one of the States under the form of government guaranteed by the Constitution could long preserve its existence, though a despotic government might?"

In answer to this it may be suggested that the Fifteenth Amendment, in effect, repeals or modifies that provision of the Constitution which guarantees a Republican form of government to the States. Is it not manifest that a construction which would give the Fifteenth Amendment such an effect as that must be most unreasonable and unlikely to be expressive of the true intent of the framers of the Fifteenth Amendment?

*All these consequences are avoided by construing the*

*Fifteenth Amendment to have application only to Federal elections and not State elections.*

Again, it is admitted that there is no express provision in the Constitution prohibiting three-fourths of the States from interfering with the control by any State of its own electorate. Our contention is, as said by the Supreme Court in the case from which we have been quoting, in denying the power of the Federal Government to tax the means and instrumentalities of the States, that the exemption from such interference "rests upon necessary implication, and is upheld by the great law of self-preservation;" as any government whose power to control its own elections is subject to the control of another and distinct government or authority, "can exist only at the mercy of the latter."

In *McCulloch vs. Maryland*, Chief Justice Marshall said, "that the power to tax involves the power to destroy," and while the tax in question did not, as a matter of fact, destroy the United States bank, the law imposing the tax was held to be void because of its violation of the immunity which the bank as an instrumentality of the Federal Government possessed against even the beginning of such destruction. In other words, for all practical purposes any government which has lost the power to protect itself from destruction at the hands of another government or other outside authority, is regarded as having been destroyed as an independent political entity.

Again, the very language of Article V, in conferring the amending power, contemplates the continued existence of the States. The Constitution may be amended by a vote of three-fourths of the States. Once destroy the States as such and there will no longer be any Constitutional means of amending the Constitution and no means of doing so left, except by revolution. It is true that the right of a free people to change their form of government whenever in their judgment it ceases to fulfill the proper functions of government, is absolute, and is so declared to be in the American Declaration of Inde-

pendence; but that right is not a Constitutional right. It is the right of revolution. What we are concerned with here are only Constitutional rights.

*Assuming that the Fifteenth Amendment, construed to be applicable to State elections, is "an amendment" within the meaning of that term as employed in Article V. of the Constitution, it falls within the express prohibition therein contained against any amendment which would deprive a State of its equal suffrage in the Senate, without its consent.*

For it is submitted that any amendment which would have the effect under any possible circumstances of converting one of the States of the Union into an Asiatic State or an African State by compelling the white people to permit Asiatics or Negroes to vote upon the same terms as themselves, would be in substance and effect depriving the original State—the State which assented to and was contemplated and meant by the Constitution—of all representation in the Senate.

For, as we have already seen, "a State in the ordinary sense of the Constitution is a political community of free citizens occupying territory of defined boundaries and organized under a government sanctioned and limited by a written Constitution, and *established by the consent of the governed.*" *Texas vs. White*, 16 Wall. It is such States that constitute the United States.

Now, could the people of Oregon (which, like Maryland, never ratified the Fifteenth Amendment) be said to be any longer a "political community of free citizens," with "a government established by the consent of the governed" if, without their consent, by the Act of Congress and an amendment adopted by other States enough Chinese or Japanese were directly or indirectly enfranchised within her borders to completely dominate their State Government?

What is the "political community of free citizens?" What constitutes a State? Clearly it is those people in

the State who have and exercise the political power—they constitute the State. In other words, it is the electorate that, for all political purposes constitute the State—they and such other persons as they may from time to time admit to participate with them in the political power, the suffrage.

Whenever the electorate is forced against its will to admit another race of people, especially if of a different alien race and more numerous than themselves to participation in the exercise of the powers of Government, the result is an entirely new State, and not the State which was guaranteed perpetual representation in the United States Senate by the Constitutional provision already mentioned.

It is, therefore, respectfully submitted that to construe the words "right of citizens of the United States to vote" in the Fifteenth Amendment to include the right of citizens of a *State* to vote at State or municipal elections, would give it a construction which would render it absolutely unconstitutional and void.

Or, if this is denied, it must at least be admitted that its constitutional validity is matter of the gravest doubt—a consideration quite sufficient as we have seen to forbid such a construction.

The only argument made by the learned Court below, in reply to the contentions which we have submitted under this head, will be found in the following extract from the opinion (Record, p. 17).

"It is further urged by the defendants that if the Fifteenth Amendment be construed as forbidding discrimination at State or municipal elections, it is beyond the power of the States to so amend it; and, therefore, it should not receive that construction.

I do not appreciate the force of this contention.

"That the Amendment declaring all persons born in

the United States to be citizens of the United States and of the State wherein they reside, without discrimination on account of race or color, is beyond the amending power, is not suggested; and if so, it cannot be reasonably maintained that to declare that such citizens shall not be deprived of the privileges of suffrage because of race or color, is beyond the amending power, one follows from the other."

It is respectfully submitted that one does not follow from the other. The citizenship of a State may be added to or taken from by an outside power, but so long as the new citizens are not given the right to vote at State elections the *autonomy* of that State, it is not affected in the slightest degree. Its sovereignty remains unimpaired. It has lost no function or power essential to its continued existence as a State." Such a State is still the absolute master of its own destiny. The two propositions are as far apart as the poles.

### CONCLUSION.

From the foregoing discussion it follows:

First. That the plaintiffs cannot maintain their present action, in any event, without an allegation of malice.

Second. That the Act of 1908, Chapter 525, contains no provision which works any discrimination against any person on account of race, color or previous condition of servitude.

Third. That assuming plaintiffs' contention that the said Act does discriminate against plaintiffs on account of race or color, etc., to be correct, they still cannot maintain these actions which are founded upon an alleged right to register and the right to vote, because,

- (a) If any one of the provisions of said Act is stricken down, the entire Act must fall, because its provisions are inseparable, and the plaintiffs can claim no rights under it, or

- (b) If the provisions fixing Class 3, is alone stricken out, there still remains other provisions fixing qualifications for registration that the plaintiffs do not show they could comply with, and consequently would have no right to register under said Act.

Fourth. That plaintiffs cannot maintain their present actions in this Court because neither the Constitution of the United States nor any of the amendments thereto gives any right whatever regarding municipal elections.

- (a) Because the Fifteenth Amendment, which is relied upon by plaintiffs as establishing such a right, only applies to Federal elections and does not in any way affect State elections, or
- (b) Assuming that it does apply to State elections, the right to vote therein mentioned, does not include the right to vote at a purely Municipal election.
- (c) For if the Fifteenth Amendment is construed to have reference to voting at State or Municipal elections, the same would be beyond the amending power conferred upon three-fourths of the States by Article V. of the Constitution, and therefore, the amendment should not receive that construction, if it is fairly open to a more limited construction.

For these reason we respectfully submit that the judgment in each of these cases should be reversed.

Respectfully submitted,

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Office Supreme Court, U.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

Nos. 8, 9 & 10

CHARLES E. MYERS AND A. CLAUDE KALMEY,  
*Plaintiffs in Error,*

VS.

JOHN B. ANDERSON.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

It is admitted in the brief of the defendants in error that Chapter 525 of the Acts of 1908, being the Annapolis Registration Law, made no change in the qualifications for registration and voting at municipal elections in Annapolis except those contained in the four classes enumerated in section 4 of the Act; in other words, that portion of the Act which is alleged to be wholly or partially void. But it is argued by

defendants in error that the Legislature would nevertheless have passed the Act without the void part for the reason that the Act does make a change in the number of registration officers, the original law requiring two registrars, and this Act providing for three, giving one political party a majority. There are two obvious answers to this contention:

1. The title of the Act is "An Act to fix the qualifications of voters at municipal elections in the City of Annapolis and to provide for the registration of said voters." If the purpose of this Act was to make no change in the law except a change in the number of registrars, this title would be totally misleading, and the Act itself unconstitutional and void, under Article III, section 29, of the Constitution of Maryland.

2. The rule is, if a part of an Act is found to be void, the whole must be void, unless the Court can see that the Legislature would have enacted the law without the void part. The theory of the counsel for the defendants in error is that the Legislature of Maryland would have enacted this law for the mere purpose of giving to the dominant political party, whose Governor appointed the supervisors of elections, who in turn selected the registrars, the advantage of having a majority of the Board of Registrars in Annapolis, at municipal elections. It is submitted that this Court will not indulge the presumption that the Legislature of Maryland intended to accomplish any such evil purpose. But aside from this, it is perfectly plain that the provision that there should be an odd number of registrars, namely, three, is part of the general plan of registration, and was adopted for the express purpose of preventing a deadlock in the Board of Registrars at municipal elections over the question of registering voters under the so-called "Grandfather's Clause."

It is further contended by defendants in error that section 1979 of the Revised Statutes gives a right of action upon the facts alleged in the declaration in these cases. We respectfully submit in addition to what has already been said in our main brief in this case in answer to this contention, that if that section does attempt to confer such right of action it is not appropriate legislation under the second section of the Fifteenth Amendment, because the result would be to deprive the State of the right to test the constitutionality of any of its laws in a judicial proceeding. The subjection of State officers charged with the duty of enforcing State laws to liabilities such as those which it is contended by defendants in error are imposed by section 1979 of the Revised Statutes, would completely destroy the autonomy of the States, and would in effect deprive them of a republican form of government secured to them by the Constitution of the United States.

*Ex Parte Young*, 209 U. S. 123;

*Ex Parte Virginia*, 100 U. S. 339.

Respectfully submitted,

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WILLIAM L. RAWLS,

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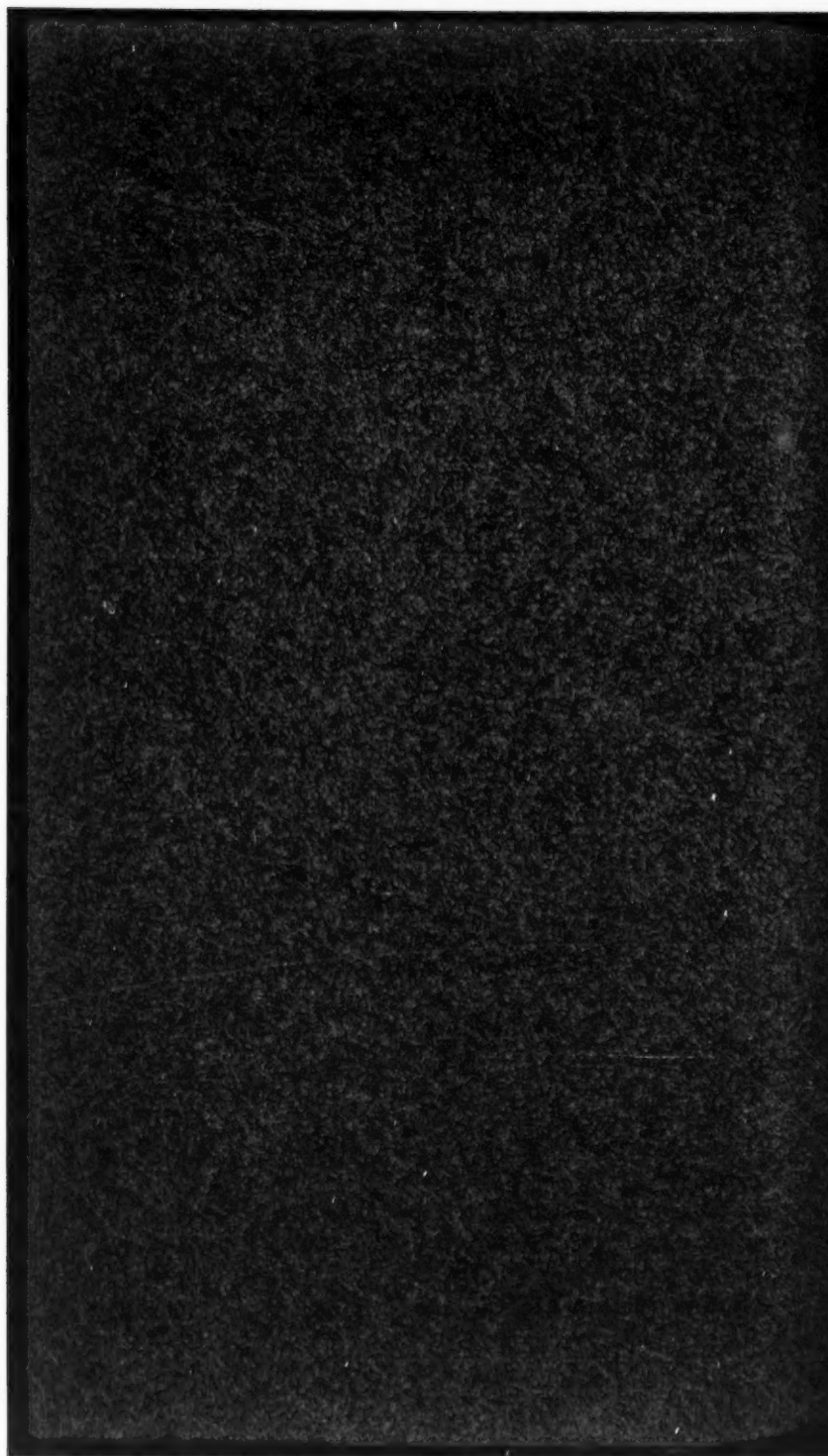
~~NOVEMBER TERM~~ **8 9 & 10**

**CHARLES K. STEVENS and A. CLAUDE KALMEY**  
*Plaintiffs in Error*

**JOHN B. ANDERSON**

**BRIEF FOR DEFENDANT IN ERROR**

**EDGAR H. GANS**  
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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1913.

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Nos. 58, 59, 60.

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CHARLES E. MYERS AND A. CLAUDE KALMEY,  
*Plaintiffs in Error,*

VS.

JOHN B. ANDERSON.

---

**BRIEF FOR DEFENDANT IN ERROR.**

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This was a suit brought in the Circuit Court for the District of Maryland by the defendant in error (hereinafter called the plaintiff) against the plaintiffs in error (hereinafter called the defendants), of a civil nature to recover damages for a tort. It is alleged that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arises under the Constitution and Laws of the United States. (Record, page 1.)

The action was brought under the Act of Congress, approved April 20th, 1871, Chapter 22, section 1, 17 Stat. 13, now forming section 1979 of the Revised Statutes; which reads as follows:

"Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

---

The right alleged to be violated is founded upon the Fifteenth Amendment to the Constitution of the United States, which was proclaimed to be adopted March 30, 1870, and the Act of Congress passed to enforce the Amendment approved May 31, 1870, Chapter 114, section 1, 16 Stat. 140, now constituting Section 2004 of the Revised Statutes. They read as follows:

*Amendment—*

"Sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

§1

*Appropriate Legislation—Section 2004:*

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, town-

ship, school district, municipality or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color or previous condition of servitude; any constitution, law, custom, usage or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

---

The right of the plaintiff, of which he alleges he was unlawfully deprived, was the right to vote at a municipal election in the City of Annapolis, State of Maryland, without distinction and discrimination against him by reason of his race and color.

---

The circumstances under which he was deprived of this right by the defendants are set forth in detail in the declaration (Record, pages 1-5), and are in substance as follows:

The plaintiff, who is a colored man, is a citizen of the United States, born in Anne Arundel County, Maryland, in 1834; that on January 1, 1868, he had been a resident of the State and of Anne Arundel County for over 30 years, and of the City of Annapolis for over 3 years; that he would have been entitled to vote except for the fact that he was a negro, and the Constitution of Maryland confined the suffrage to white males over 21 years of age; and that he had creditably served in and been honorably discharged from both the military and naval service of the United States. That immediately after the adoption of the Fifteenth Amendment he was duly registered as a legal voter in Anne Arundel County, and has continuously been allowed to vote in all elections, including the municipal elections of the City of Annapolis, up to the wrongful acts of the defendants in 1908, a period

of more than 38 years. That during all that time he was never disqualified from voting for any of the reasons set forth in the Constitution and Laws of Maryland.

Of this right, exercised for so many years, he was deprived by the defendants, who constituted a majority of the registers of voters for the City of Annapolis, in 1909, under color of the Acts of Assembly of Maryland of 1908, Chapter 525, set out in full in the Record, pages 6-7.

The plaintiff alleged that he applied for registration under said Act as a legal voter, and under color of said Act the defendants refused to permit him to be registered as a voter because he was a colored man, and for no other reason, and he was thereby deprived of the right to vote at the municipal election held in Annapolis on July 12, 1909, and at all future municipal elections.

---

This declaration was demurred to for the reasons set forth in the Record, pages 10-11, but the demurrer was overruled by the Court. The opinion of the late Judge Morris is found in the Record, pages 12-20.

Thereafter evidence was taken on behalf of the plaintiff, and no evidence being offered by the defendants, the Court, sitting as a jury, found a verdict for the plaintiff for \$250. (Record, pages 21 and 24-28.)

The case comes to this Court on writ of error, the assignments of error being fully set forth in the Record, pages 31-34, and in accordance with the rule in the brief of the plaintiffs in error.

## ARGUMENT.

## I.

It is argued that there was no legally sufficient evidence to support the allegation in the declaration that the plaintiff was denied registration on account of his race and color.

The Act of Assembly of 1908, Chapter 525, fixed for the first time, as to municipal elections in the City of Annapolis, the following qualifications for registration as a voter:

1. All taxpayers of the City of Annapolis assessed in the city books for at least five hundred dollars;
2. And duly naturalized citizens;
- 2½. And male children of naturalized citizens who have reached the age of 21 years;
3. All citizens who, prior to January 1, 1868, were entitled to vote in the State of Maryland or any other State of the United States at a State election, and the lawful male descendants of any person who prior to January 1, 1868, were entitled to vote in this State or in any other State of the United States at a State election.

It requires no argument to show that this law was intended to deprive colored men of the right to vote, and thereby nullify the Fifteenth Amendment. Under it no white male of 21 years of age and over is disfranchised. Under it nearly every colored man is disfranchised unless he happens to be a taxpayer assessed at \$500, or a naturalized citizen or a male child of a naturalized citizen of 21 years of age or over. Everyone knows that the number of colored men in a city like Annapolis who are assessed at \$500 or who are naturalized citizens or the children of naturalized citizens, is so trifling as to be negligible. Everyone also knows that the date,

January 1, 1868, was selected for the express purpose of allowing all white men to vote, even though they paid no taxes, and of disfranchising nearly all colored men. If the date January 1, 1871, instead of January 1, 1868, had been suggested, the law would not have been passed, as it would be pointless. These other qualifications, such as assessment for taxation and naturalization, are hypocritical and put in the law merely to obscure the real intent. It is also cowardly. The law should have been written that no colored man shall vote who is not assessed at \$500 and who is not a naturalized citizen, or the child of a naturalized citizen, but all white men shall be allowed to vote. This would at least be honest, though unconstitutional.

The proof in the case showed that the plaintiff was a colored man; that he had served in the Army and Navy of the United States before January 1, 1868; that he would then have been entitled to vote except for his color; that since the Fifteenth Amendment he has continuously voted for 38 years; that in his application for registration, the facts of which were not controverted in any way, he stated in writing, that he was not a taxpayer of the City of Annapolis assessed for \$500, that he was not a naturalized citizen nor the child of a naturalized citizen, that he was not entitled to vote prior to January 1, 1868, only because he was a colored man; that he applied for registration, and the only reason for refusing him the right would be that he was a colored man; that this reason was not valid since the Fifteenth Amendment; that he was given the distinct right to register and vote under section 2004 of the Revised Statutes, and if he was denied the right the defendants would be liable to him in a proper proceeding for redress. (See Record, pages 24-5.)

It was upon this uncontradicted statement that he was denied registration on the ground that he was not comprised within the classes described in the Act. Under these circumstances, it is too clear for discussion that he was refused

registration on account of his color. If he had been a white man he would have been registered, though not a taxpayer or a naturalized citizen, as he would have been entitled to vote prior to January 1, 1868. Being a colored man he was refused registration, because, though not entitled to vote prior to January 1, 1868, this was only on account of his color.

## II.

It is argued that the declaration in the case stated no cause of action because it did not allege that the action of the defendants in refusing to register the plaintiff was willful and malicious.

This argument is founded on the well-known principle, that an officer of registration, in passing on the right to register, is a quasi-judicial officer upon whom is placed the obligation of deciding primarily the facts and the law which apply to the specific case before him, and his only legal obligation is to use good faith. For a *bona fide* mistake in his decision as to law or fact he is no more responsible than a judge would be.

There is no question about the principle in cases to which it applies. The real question here is—does it apply to the present case?

The defendants claim that the acts done by them were done in their official capacity, under the compulsion of a Maryland Statute and therefore could not be willful and malicious.

The declaration states that what they did was contrary to the Constitution of the United States and an Act of Congress, and was specifically forbidden thereby.

The point the defendants really make, therefore, is that, conceding the act done by them to be specifically forbidden by the Constitution and an Act of Congress, they would not

be liable therefor, because they in good faith believed they were obliged to be governed by the Maryland law; that this law did not violate the Federal Constitution and Act of Congress, and in this they were in good faith mistaken.

In other words, the real question is—can a Maryland official, exercising the power of the State, violate the Constitution of the United States and an Act of Congress, and deprive the plaintiff of a right granted thereby, and when sued for the wrong, justify by setting up his ignorance of the law?

It is easy to understand why a Maryland register, appointed under its laws, given authority by it to exercise quasi-judicial functions, should not be held liable, under its laws, for making a mistake in judgment as to rights to vote claimed by its citizens. On these matters he is made a judge, in the first instance at least, of the law and fact, and it throws around him the shield of protection against suits by individuals who happen to be deprived of rights granted by it, through the register's *bona fide* mistakes.

But these registers are not officers of the United States. As State officers, representing the power of the State over the franchise of its citizens, they are forbidden by a higher power to do a specific thing. Can they violate this specific prohibition and claim immunity by alleging ignorance of the law? If so, the specific prohibition becomes inoperative and valueless. State action is effectively prohibited only through the officers who carry out unconstitutional acts. The United States does not vest State officers with quasi-judicial functions. It is carrying out a definite specific policy. Its mandate is imperative. The black man shall have a right to vote wherever the white man has the right. Equality of right. No discrimination on account of color or race. This is a simple mandate and intended to be enforced. To concede that this mandate has been violated, either because the official thought he ought to follow the law of the State which appointed him, or because he thought the State law not obnox-

ious to the Constitution, and that the plaintiff had been wronged thereby and has no remedy for his wrong, is equivalent to saying that the Constitution of the United States is a paper document without practical force or power.

This thought is emphasized by the case quoted by the appellants in error in their brief (pages 28-9).

They cite the case of *Dwight vs. Rice*, 5 La. Ann. 580, where the constitutional provision prohibiting anyone who had engaged in a duel, or challenged any one to fight a duel, from voting, was in dispute. The vote of a plaintiff was refused because he was accused of sending a challenge to fight a duel, and he declined to take the oath prescribed by an Act of the Legislature that he had not. The point made was that the Act was unconstitutional and the election officer should have disregarded it. He thought differently and refused the vote. It turned out that he was right, for the Court decided the Act constitutional. In passing on the question of liability, however, on the assumption that the Act was unconstitutional, the Court say (Brief of Appellants in Error, pages 28-9):

"Laws are the will of the people expressed through their legislative representatives. Now, we find no statute or article of the Code to the effect that damages should be inflicted under the circumstances of the present case. We have then to ask ourselves, in the absence of express law, what equitably is the will of the people in such a case? The best means of ascertaining it is to ask ourselves if the General Assembly would enact a law to impose damages on the Commissioners of Election under such circumstances."

The case is typical. Where a State appoints an officer and gives him quasi-judicial functions, it is not to be supposed that it intends him to be liable for mistakes unless it says so. But where a higher power steps in and says—"You may

exercise your quasi-judicial power to a certain extent, but when you violate a mandate of mine you will be liable to an action for redress at the suit of any one injured"—then the case is quite different. The express law, which the decision said was wanting, is here supplied. And necessarily so. No government can impose a specific obligation successfully if it listens to the plea that the defendant did not know what it meant. It is the old rule—*ignorantia legis non excusat*.

This question has always been decided in one way, because otherwise the enforcement of a law would depend not on the law itself, but on what the violator of the law thought it meant.

In *Ellis vs. U. S.*, 206 U. S. 246, this Court says, in speaking of a criminal statute which provided that the prohibited acts should be done "intentionally":

"The argument against the instruction is that the word 'intentionally' in the Statute requires knowledge of the law, or at least, to be convicted, Ellis must not have supposed, even mistakenly, that there was an emergency extraordinary enough to justify his conduct. The latter proposition is only the former a little disguised. Both are without foundation. If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law, under these circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

So that here we have a specific duty imposed on the election officials of the States, to allow a black man to vote whenever a white man can—to treat him alike—and we have this duty violated. A special right violated to the injury of the plaintiff always gives a right of action. There was no necessity for an Act of Congress.

As stated by the Court of Appeals of Maryland in the case of *County Commissioners vs. Duckett*, 20 Md. 478:

"When a duty is imposed by statute and no remedy provided, the right of action accrued by common law, otherwise there would be a right without a remedy."

Here, however, there is no need for the plaintiff to invoke the principle *ubi jus ibi remedium*, for both the right and remedy are clearly set forth in Acts of Congress. The right is not only given by the Fifteenth Amendment, the adoption of which was proclaimed on March 30, 1870, but by a contemporaneous Act of Congress was specifically defined.

By the Act approved May 31, 1870, Chapter 114, section 1, 16 Stat. 140, the Congress exercised the powers conferred upon it by the second section of the Amendment by enacting the following provision, now constituting U. S. R. S. sec. 2004:

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color or previous condition of servitude; any constitution, law, custom, usage or regulation of any State or Territory or by or under its authority to the contrary notwithstanding."

Here the right to vote at any of the elections specified is distinctly given, as a method of enforcing the Fifteenth Amendment, to any citizen of the United States without distinction of race or color. It is a right given by the United States to the black man, whenever, under the same circumstances the white man would have the right.

## III.

Here is a distinct right given to citizens of the United States. It is true that the right to vote is, as a rule, given by the State, but in the special case of a colored man in a former slave-holding State it is in effect given by the United States

This is the meaning of the case *Ex parte Yarbrough*, 110 U. S. 651, where Mr. Justice Miller, speaking for this Court, says:

"The Fifteenth Amendment of the Constitution, by its limitation on the power of the States in their exercise of the right to prescribe the qualification of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the National Government and was not intended to be left within the exclusive control of the States."

And again:

"While it is quite true, as was said by this Court in *United States vs. Reese*, 92 U. S. 214, that this article gives no affirmative right to the colored man to vote and is designed primarily to prevent discrimination against him wherever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding States had not removed from their constitutions the words 'white man' as a qualification for voting, this provision did in effect confer on him the right to vote, because, being paramount to the State law, it annulled the discriminating word 'white' and thus left him in the enjoyment of the same right as white persons. And such would be

the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people, whether they be men or women. *Neale vs. Delaware*, 103 U. S. 370.

"In such cases the Fifteenth Article of Amendment does, *proprio vigore*, substantially confer on the negro the right to vote and Congress has the power to protect and enforce that right."

And in *Gibson vs. Mississippi*, 162 U. S. 591, the Court says:

"Underlying all these decisions is the principle that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government or by the State against any citizen because of his race. All citizens are equal before the law."

In Maryland, we have precisely the circumstances indicated in the *Yarbrough* case.

The Constitution of Maryland provided as to the suffrage—Article 1, section 1:

"All elections shall be by ballot; and every white male citizen of the United States of the age of twenty-one years or upwards who has been a resident of the State for one year, and of the Legislative district of Baltimore City or of the County, in which he may offer to vote, for six months preceding the election, shall be entitled to vote in the ward or election district in which he resides, at all elections hereafter to be held in this State."

By this Constitution a negro was forbidden to vote because he was not a "white male citizen." Since the Amendment he is entitled to vote because the operation of the Amendment is to excise the word "white." If he could not vote

before the Amendment and can vote since the Amendment, it is idle to say that the Amendment did not substantially give him the right of suffrage. In all cases where the State laws give to white persons the right to vote, then the operation of the Amendment is to give the negro a similar right, and this is a right accruing to him as a citizen of the United States which may be protected and enforced by Congress. This effect of the Amendment has been repeatedly recognized by the Court of Appeals of Maryland.

In *Shaeffer vs. Gilbert*, 73 Md. 66, the appellee in that case, who is described as "a young colored man," was held entitled to be registered as a voter of Baltimore City. The Court say (page 69):

"Upon the facts, about which there is no dispute, the question is whether he is now entitled to be registered as a voter in said city? And this depends on whether he is a resident of the city within the meaning of section 1 of Article 1 of the Constitution, which declares that 'every male citizen of the United States of the age of twenty-one years or upwards, who has been a resident of the State for one year and of the Legislative District of Baltimore City, or of the County, in which he may offer to vote, for six months preceding the election, shall be entitled to vote in the ward or election district in which he resides.'"

Now, although the Constitution, Article 1, section 1, said, "white male citizen," the Court of Appeals Judges thought the word "white" was so thoroughly excised, that even in quoting the Constitution they leave out the word.

To the same effect are—

*Southerland vs. Norris*, 74 Md. 326;

*Hanna vs. Young*, 84 Md. 179;

*Pope vs. Williams*, 98 Md. 66, affirmed 193 U S  
621.

## IV.

Having thus a specific right given by the United States, whether that right is called the right to vote, in view of the circumstances in this case, or "the right not to be discriminated against on account of color or race," as it is usually described, the common law gives, as we have seen, a remedy to a plaintiff who has been injured by its violation. There was no need for an Act of Congress to give a remedy. Such a remedy has, however, been given.

By the Act approved April 20, 1871, Chapter 22, section 1, 17 Stat. 13, the Congress enacted a provision, now forming U. S. R. S. sec. 1979, in the language following:

"Every person, who under color of any statute, ordinance, regulation, custom, usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

It is urged that the statute creates no new cause of action. This, in a sense, is true. The Fifteenth Amendment R. S. sec. 2004 created a new right, and this statute declares a remedy for that right. If our contention is correct, the common law supplied an action of tort for an infraction of the right, but this common law action for the violation of this specific right did not depend upon the violation being malicious or willful. This statute, section 1979, is declaratory of the common law remedy, as we understand it.

The Statute says that there shall be an action at law for a person deprived of a right secured by the Constitution and Laws of the United States under color of a State Statute.

What is meant by "under color of any statute"?

Obviously, that a State official is acting under a State law which in terms allows him to subject the plaintiff to the deprivation of a right guaranteed by the United States.

In *State of Iowa vs. Des Moines*, 96 Iowa (31 L. R. A. 186), quoted by this Court in *McCain vs. Des Moines*, 174 U. S. 175, the Court say:

“Color of law does not mean actual law. ‘Color’ as a modifier, in legal parlance, means appearance as distinguished from reality. Color of law means semblance of legal right.”

So in this case the defendants acted under color of law. They refused registration to a plaintiff under a provision of the Act of 1908, which was not actual law, but only a semblance; it was void, as contrary to the Fifteenth Amendment and the Act of Congress. And yet the real defense of the defendants is that they acted under “color” of a State statute—that is, they acted under a statute that they thought was valid. This act, however, of the defendants is the very thing the Statute declares a remedy for in favor of the plaintiff, and is the very evil which the Amendment and the Act of Congress intended to suppress. When the Amendment placed a mandate on all official acts of a State, requiring no discrimination on account of color or race, it was well known that there were State Constitutions and Statutes under color of which the negro would or could be discriminated against. This clear, contemporaneous, legislative declaration of the common law remedy accords with the nature of the right and its violation, and supports the contention already made in this Brief.

Furthermore, the defendants do not seem to have grasped the distinction between the right conferred upon the plaintiff by U. S. R. S. 2004 and 1979, and the kind of right asserted in *Bevard vs. Hoffman*, 18 Md. 479, and the other cases cited by appellants in error in their brief.

The Court of Appeals says in that case:

"What is the right of a citizen under our election laws? \* \* \* If the citizen has had a fair and honest exercise of judgment by a judicial officer in his case, it is all the law entitles him to, and although the judgment may be erroneous, and the party injured, it is '*damnum absque injuria*,' for which no action lies."

Of course, had Congress seen fit so to do, it might have restricted within these narrow limits the remedy of a citizen for the denial or abridgement of the rights conferred on him by the Fifteenth Amendment. It is, indeed, obvious that such a restriction would render the remedy practically nugatory and the right very nearly, if not altogether, valueless. It was, however, a matter within the discretion of the legislative power whether or not the right in question should be made of real value by the provision of an effective remedy for its violation. The contention of the defendants is that, when Congress has provided an effective remedy to safeguard the sanctity of the right, this Court shall destroy the efficacy of this remedy and thus render the right worthless by reading into these two sections of the Revised Statutes a requirement which they do not contain. In other words, they ask the Court to insert the words "willfully," "maliciously," or "in bad faith," or other words of equivalent import, in United States Revised Statutes 1979, between the words "territorial" and "subjects." We respectfully submit that this would be judicial legislation, for, not only would the interpolation of the words suggested destroy the practical efficacy of the remedy, but it is matter of history that the purpose of this Act was to compel any State officer or other persons who might practically deny the validity of the *post-bellum* Amendments and of the legislation enacted for their enforcement to make this denial at his peril.

The defendants were not *compelled* to become officers of registration under the Act of Assembly of 1908. They did so voluntarily and with imputed knowledge of the Fifteenth Amendment and of U. S. R. S. 1979 and 2004. They accepted, therefore, the risks of their office as well as its honors and emoluments, and, if they chose to disregard the provision of the Supreme Law of the Land, relying upon erroneous legal advice or ignorantly and rashly assuming to deal with the question themselves, they must take the consequences.

In this brief, attention has been called to the fact that even where the law required the acts to be done "intentionally," and where the statute was clearly penal and the proceeding criminal, a mistake of *law* on the part of the defendants was held to be no defense (*Ellis vs. U. S.*, 206 U. S. 257). Here there is no such word as "intentionally"; the statutes are remedial and the proceeding is civil.

In the case of *Brickhouse vs. Brooks*, 165 Fed. 534, a case almost identical with those at bar, it was held that:

"In an action under Rev. St. sec. 1979 (U. S. Comp. St. 1901, p. 1262), to recover damages for depriving plaintiff of rights secured to him by the Constitution and Laws of the United States under color of a State statute or law, the plaintiff is not required to allege that defendants acted maliciously."

And Judge Goff says (page 543):

"It was not necessary that the plaintiff should allege in his declaration that the defendants in rejecting his vote acted either maliciously or intentionally wrongful. The statute under which the plaintiff proceeded does not so require, and the rules of pleading applicable to common-law suits, to which the defendants refer in the effort to sustain their demurrer, do not apply to this action."

In this connection we may also refer the Court to the case of *Monroe vs. Collins*, 17 Ohio St. 665, pp. 691-692.

The authorities cited by appellants in error, to wit, *Hemslley vs. Myers*, 45 Fed. Rep. 290; *Aultman vs. Brownfield*, 102 Fed. 13, and *Giles vs. Harris*, 189 U. S. 475, decide nothing further than that section 1979 creates no new right and does not change the previous rules of pleading in law or equity.

No one disputes this proposition. The new right was created by the Fifteenth Amendment and section 2004, and, therefore, for a wrong to this new right equity could not be resorted to because equity never deals with political wrongs.

## V.

It is argued that section 1979 has no application to the cases at bar because the original Act from which the section was taken was passed to enforce the Fourteenth Amendment.

This Court, in the case of *Giles vs. Harris*, 189 U. S. 475, did not seem to see any such difficulty. That case involved the right of the negro to vote under the Fifteenth Amendment, and directly dealt with section 1979 as giving a remedy.

The Court (Mr. Justice Holmes) (page 485), after assuming that section 1979 had not been repealed, and that the section extended to a deprivation of rights under a State constitution, say:

"On these assumptions we are not prepared to say that an action at law could not be maintained on the facts alleged in the bill."

There is here no suggestion that section 1979 did not apply to the right to vote on the ground that it was a political right given by the Fifteenth Amendment, and not a civil right given by the Fourteenth Amendment. There is no discrimination in this case between civil and political rights except on the point of the jurisdiction in equity to enforce a remedy.

The Court further says (page 488):

"Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself. must be given by them or by the legislature and political department of the government of the United States."

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Here is a clear implication that an action of damages will lie under the Act at the suit of a person injured in being deprived of his vote, which is all that we contend for.

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Again it must be remembered that we are dealing with a section of the Revised Statutes. This Court has said that where the meaning of the words in a section of the Revised Statutes is clear, you can not go back to the original law as a help to the meaning. You may get help to solve an ambiguity on the face of the section by going back to the original law, but you can not go back to the original law to create the ambiguity.

U. S. vs. Bowman, 100 U. S. 508;  
 Vietor vs. Arthur, 104 U. S. 498;  
 Hamilton vs. Rathborn, 175 U. S. 144;  
 U. S. vs. Oregon Co., 164 U. S. 256.

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Reference is also made to the title of the Act of April 20, 1871, from the first section of which section 1979 was taken. The title reads:

"An Act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States and for other purposes."

It must be remembered, however, that the title is no part of the Statute and does not prevail against the context.

Patterson vs. Bark Eudora, 190 U. S. 169.

By the context of the section, the rights for which remedy is given are "any rights \* \* \* secured by the Constitution and laws." The negro had a right to vote in Maryland, and a right not to be discriminated against in any State in the matter of franchise on account of his color, and this right existed on April 20, 1871, the time at which section 1979 was passed, for it had been given by the Fifteenth Amendment, adopted on March 30, 1870, and by the Act of 1870, Chapter 114, now section 2004 of Revised Statutes, and both sections 1979 and 2004, were adopted by the adoption of the Revised Statutes, *uno flatu*, in 1873.

The context is clear and free from ambiguity, so far as this question is concerned.

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But it is further argued that section 1979 was not intended to cover the case at bar, because we have here a political right, and not a civil right, and for this contention appellants in error cite *Holt vs. Indiana Mfg. Co.*, 176 U. S. 68, and *Wadleigh vs. Newhall*, 136 Fed. 946.

The context of the section makes no such discrimination. A careful examination of the cases cited show that they involved questions of jurisdiction of the Circuit Court, where the point at issue did not in any way touch on the difference between civil and political rights, but only the difference between civil rights—that is, rights secured by the Government of the United States and property rights. Except as to proceedings in equity, where the distinction is made between civil and political rights, "civil" includes "political," and is used to distinguish against property rights or crimes. Thus

in this very declaration the case is alleged to be "a suit of a civil nature," and the amount involved to be over \$2,000 exclusive of interest and costs, and arising under the Constitution and Laws of the United States. (Record, page 1.)

In the *Civil Rights cases*, 109 U. S. 3, this Court, in discussing the question whether individuals are liable for acts done without the sanction of State authority, deals with the right to vote under the classification of civil rights. (See page 17.)

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It is also argued that this section 1979 is not applicable; because the right to vote is not directly but only incidentally given, and for this proposition the case of *Carter vs. Greenhow*, 114 U. S. 317, is cited. This was a case in which the complainant charged that he was not allowed to pay his taxes with tax receivable coupons, and that the Statute under which he was prevented from so doing was an impairment of his contract under the Constitution of the United States.

This Court held that the right to pay taxes in coupons was not given by the United States, and that the ultimate right so to do came about indirectly by having the obnoxious law judicially declared invalid. The only right he had was to have a judicial determination declaring the nullity. The Court was very careful not to attempt to enumerate the class of rights for which suit could be brought under section 1979, but confined itself expressly to the single proposition, that it was not applicable in the case of the impairment of a contract.

In the case at bar, however, we have a definite right given a plaintiff which is indirect only in a certain sense. It is direct when the Amendment operates on a constitution which contains the word "white." It is not necessary in order to vote to resort to a judicial proceeding to determine whether

"white" should be excluded or not. The right exists *proprio vigore* whenever the white man has the right to vote, and in these circumstances the right comes directly from the Amendment, as we have already seen.

## VI.

Does the Fifteenth Amendment apply to municipal elections? So far as the counsel for the plaintiffs are aware, the only judicial opinion in which any doubt on this subject has been expressed is found in the case of *Willis vs. Kalmbach*, 64 S. E. 342.

The language there used would seem to be merely *obiter dicta*, and the Court's suggestions as to the scope of the Fifteenth Amendment are altogether inconsistent with the language of other courts of the highest authority. Thus in *Karem vs. U. S.*, 121 Fed. 252, Judge (now Justice) Lurton says of U. S. R. S. section 2004: "It does nothing more than the Amendment does *proprio vigore*," and quotes Mr. Justice Miller's language in *Ex parte Yarbrough*, 110 U. S. 651, to the effect that the Amendment "annulled the discriminating word 'white' wherever it was found in a State constitution or election law"; and, again in the language of the Court in *Ex parte Yarbrough*, "thus placed the colored person in the enjoyment of the same rights as white persons," the language of section 2004 being:

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, *city*, parish, township, school district, *municipality* or other *territorial subdivision*, shall be entitled and allowed to vote at all such elections, without distinction of race, color or previous condition of servitude; any constitution, law, custom, usage or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

We have here a judicial declaration that the meaning of the Amendment is as broad as its literal significance, and covers elections in a "city \* \* \* municipality or other territorial subdivision," no less than in a State or a Congressional district. In like manner it is said by the Court in *U. S. vs. Lackey*, 99 Fed. 956:

"The Fifteenth Amendment, within the scope of its purpose, is as wide as the right to vote itself. It expressly and unequivocally prohibits the denial or the abridgement of the right to vote at any election whatever—national, state or *municipal*—on account of race, color or previous condition of servitude. Its terms are general, and it is as admissible to exclude all elections from its operation as it is to exclude any. Within the limitations specified it applies to the elective franchise—the right to vote—*whenever, wherever and however* exercised by the people. It is apparent and undeniable that the nation itself determined to take care that no such discrimination as that provided against should be made, and it not only adopted the amendment to prohibit it, but authorized the Congress to enforce the prohibition by appropriate legislation."

It is true that the decision in this case was afterwards reversed (107 Fed. 114), but on an entirely different ground. It so happens that the case of *U. S. vs. Reese*, 92 U. S. 214, itself arose from an alleged offense committed at "*a municipal election in the State of Kentucky*" (U. S. p. 215). What the Court says of the scope of the Amendment must therefore be considered as applicable to such an election. For the sake of convenience, the attention of the Court may be recalled in this connection to language already quoted:

"The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this

particular, to one citizen of the United States over another on account of race, color or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this Amendment, there was no constitutional guaranty against this discrimination; now there is. It follows that the Amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. This, under the express provisions of the second section of the Amendment, Congress may enforce by 'appropriate legislation.' "

92 U. S. pp. 217-218.

But the concurring opinion of Mr. Justice Clifford and the dissenting opinion of Mr. Justice Hunt in the same case are even more directly applicable. The former says (page 22):

"Since the adoption of that Amendment, Congress has legislated upon the subject; and, by the first section of the Enforcement Act, it is provided that citizens of the United States, without distinction of race, color or previous condition of servitude, shall, if *otherwise* qualified to vote in State, Territorial or municipal elections, be entitled and allowed to vote at *all such* elections, any constitution, custom, law, usage or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

"Beyond doubt, that section forbids all discrimination between white citizens and citizens of color in respect to their right to vote."

The Justice then discusses the special conditions imposed upon the exercise of the suffrage in the particular municipality in question (the City of Louisville), and says:

"Disability to vote of *every kind*, arising from race, color or previous condition of servitude, is declared by the first section of that Act to be removed from the colored male citizens \* \* \* Legal disability to vote at *any such* election, arising from race, color or previous condition of servitude, is removed by the Fifteenth Amendment, as affirmed in the first section of the Enforcement Act." (pages 226-227.)

And goes on to show that the indictments in that case did not show the particular negro therein mentioned to have these special qualifications, and therefore he was not shown to be entitled to vote at the election because he would not have been so entitled under the averments of the indictment had he been a white man. Mr. Justice Hunt quotes the language of the Amendment, and says:

"I observe, in the first place, that the right here protected is in behalf of a particular class of persons; to wit, citizens of the United States. The limitation is to the persons concerned, and *not to the class of cases* in which the question shall arise. The right of citizens of the United States to vote, and not the right to vote at an election for United States officers, is the subject of the provision. The person protected must be a citizen of the United States; and *whenever a right to vote exists in such person*, the case is within the Amendment. This is the literal and grammatical construction of the language; and that such was the intention of Congress will appear from many considerations." (page 246.)

He then discusses the language of the resolution submitting the Amendment as originally introduced and as finally adopted, and says:

"In neither resolution was there any limitation as to *the character of the elections* at which the vote was to be given. If there was a right to vote and the person offering to vote was a citizen, the clause attached. It is both illiberal and illogical to say that this protection was intended to be limited to an election for particular officers." (pages 246-247.)

Finally he says, on the same subject:

"Hence the Fifteenth Amendment was passed by Congress, and adopted by the States. The power of any State to deprive a citizen of the right to vote on account of race, color or previous condition of servitude, or to impede or to obstruct such right on that account, was expressly negatived. It was declared that this right of the citizen should not be thus denied or abridged.

"The persons affected were citizens of the United States; the subject was the right of these persons to vote, not at specified elections or for special officers, not for Federal officers or for State officers, but *the right to vote in its broadest terms*. \* \* \* I hold, therefore, that the Fifteenth Amendment embraces the case of elections held for State or municipal as well as for Federal officers; and that the first section of the Act of May 30, 1870, wherein the right to vote is freed from all restriction, by reason of race, color or condition, at all elections by the people—State, county, town, *municipal*, or of *other subdivisions*—is justified by the Constitution." (pages 246-247.)

This language was substantially adopted by Mr. Justice Miller in the passage already called to this Court's attention:

"The Fifteenth Amendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters *in their own elections*, and by its limitation on the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was *not intended* to be left within the exclusive control of the States."

110 U. S. p. 664.

Finally the attention of the Court may be properly called to the language of Mr. Justice Bradley on Circuit in the case of *U. S. vs. Cruikshank*, 25 Fed. Cas. 712. He there says:

"I will next consider the effect of the 15th Amendment, to enforce which the law under consideration was primarily framed. The Amendment declares that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude,' and power is given to Congress to enforce the Amendment by appropriate legislation. Although negative in form, and therefore, at first view, apparently to be governed by the rule that Congress has no duty to perform until the State has violated its provisions, nevertheless, in substance, it confers a positive right which did not exist before. The language is peculiar. It is composed of two negatives. The right shall not be denied; that is, the right shall be enjoyed; the right, namely, to be exempt from the disability of race, color or previous condition of servitude, as respects the right to vote. \* \* \* But whilst the Amendment has the

effect adverted to, it must be remembered that the right conferred and guaranteed is not an absolute, but a relative one. It does not confer the right to vote. That is the prerogative of the State laws. It only confers a right not to be excluded from voting by reason of race, color or previous condition of servitude, and this is all the right that Congress can enforce. It confers upon citizens of the African race the same right to vote as white citizens possess. It makes them equal. This is the whole scope of the Amendment."

It is safe to say that in no case arising under the Fifteenth Amendment can there be found any authority for a distinction between State and municipal elections as affecting the scope of that Amendment.

The defendants have cited as authorities in support of their proposition on this head a number of decisions of State courts holding that the language of particular provisions of State Constitutions relating to the qualifications of voters do not apply to municipal or other special elections, the case of *Hanna vs. Young*, 84 Md. p. 179, being the last authority to that effect in this State. As a matter of fact, there is, on this subject, considerable conflict of authority, and about as many decisions might be cited to the contrary of the proposition as in its support; but it is respectfully submitted that none of these decisions are in point; they simply show the construction put by the respective courts on differently worded sections of their respective State Constitutions, and, when we find the Fifteenth Amendment construed by an almost simultaneous legislative enactment, and this construction endorsed by an unbroken series of approving comments on the part of Judges whose views are entitled to the highest respect, there is no reason to resort to so uncertain and deceptive a light for aid in reading it; we may safely conclude that it means what and all that it says.

See—

Matthews on 15th Am., p. 38.

That such is its meaning was held expressly in the case of *Howell vs. Pate*, 119 Ga. 539, in which case it was held that the Act of the Georgia Legislature, approved Dec. 12th, 1859, to incorporate the town of Warrenton in that State, in so far as it limited the right to vote in municipal elections held in that town to white persons, was modified by the Fifteenth Amendment to the Constitution of the United States. Certain negro citizens having been denied the right to vote at such an election in the town aforesaid because of this limitation in the charter, and their number being sufficient to change the result of the election as returned, it was held that the election was void; this is therefore a decision directly in point on this question. The defendants appear to be in error in saying that "it is not clear upon what ground the decision was based," and the fact that no opinion in support of this decision was deemed necessary by the Court is probably explained by the Court's belief that the questions involved were too plain to need or merit discussion. To the same effect, in its result, is the case of *Wood vs. Fitzgerald*, 3 Ore. 563, in which the question arose at an election for county commissioners. In the absence of any decision and with but a single *dictum* (that in *Willis v. Kalmbach*, *supra*), to the contrary, these adjudications, supported by the language of so many Judges of the highest standing, would seem to place the constitutionality of U. S. R. S. section 2004 beyond all reasonable doubt, and, of course, it will not be disputed that, if this statute is justified by the Fifteenth Amendment, this particular point of the defendants is entirely without merit. No State should be allowed to defeat the Fifteenth Amendment by its own classification of the suffrage.

## VII.

It is claimed that this case is controlled by the case of *Giles vs. Harris*, 189 U. S. 475.

It is contended that the Act of 1908 must stand or fall as an entirety; that the alleged legal and illegal parts are inseparable and part of one scheme, and if one part is void, the other part is also, as the Legislature would not have passed the law with the void parts omitted.

In *Giles vs. Harris*, the whole registration scheme of the Alabama Constitution was alleged to be a fraud and void. On this allegation of the bill the Court held that if the whole scheme was fraudulent they could not be a party to the unlawful scheme by accepting it and adding another voter to the fraudulent lists; that if the Court accepted the plaintiff's allegations for the purposes of his case he could not complain. The whole case was decided on the allegations of plaintiff's bill, and by these the whole registration scheme was void.

In the case at bar, however, the declaration carefully sets forth the parts of the Act of 1908 which he claims are valid, and those parts which he claims are void, and asks for damages because the illegal act is perpetrated under the void part of the law.

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The point, however, made by the defendants is really that the Act of 1908 shows one entire scheme, the parts of which are so inter-related that if part of the law is void the whole Act is necessarily void, no matter what the plaintiff says about it in his declaration; the matter is not one of pleading or averment of a party to a case, but a matter of essential interdependence of the various parts of a statute. The test, as they put it, is, whether the Legislature would have passed the law at all except for the part which the plaintiff alleges to be void.

They say the Legislature would not have passed any part of the law unless the part practically disfranchising the negroes were a part of it, and if they would not, then the defendants never were registers of voters and never represented the State( and could not therefore be held liable for an injury that is predicated on State action taken by its representatives.

We have stated the contention of the defendants as strongly as we know how.

Is this contention sound in this case? Of course it is always difficult to decide whether a Legislature would or would not have passed a law if a certain part was omitted or thought to be void. But, we most earnestly submit, that there is a great difference between the intention of the Legislature in passing a law without a certain provision and passing it with the provision where there is grave doubt as to its constitutionality. In the one case it could well be said the Legislature would not have passed the law at all, if the provision attacked were not in it. This provision may have been their main purpose. In the other case, they pass the law with knowledge that their action is subject to judicial criticism, but they take the chances. They will pass the law, anyhow, no matter what the courts do with it thereafter. If the courts sustain them, or if no remedy can be found that will adequately present the question, so that what wrong they do can not be redressed, they win their main purpose. If a remedy can be found that makes it necessary for the Court to really pass upon the alleged wrong they have done, and the decision is adverse,—well and good—they have satisfied their constituents and done all they could. This putting up of legislation, known to be illegal, or gravely suspected of being illegal, to the courts, and placing upon them the burden and often the odium of striking it down, is only too common in these days.

Courts must take judicial cognizance of public affairs. In Maryland, where the white vote vastly exceeds the colored vote, and where there is no negro question, except such as is conjured up by interested politicians, there have been several attempts to amend the State Constitution by having a taxing provision and a grandfather's clause. But each time it has been presented it has received the decisive condemnation of the people. Failing to amend the Constitution, some persons suggested that the result could be partially accomplished by the Legislature alone so far as municipal elections are concerned. Hence the Act of 1908 as to the City of Annapolis.

The Legislature knew when it passed the law that its constitutionality was seriously doubted and would probably be tested.

How, under these circumstances, can it be said that the whole law is void? It is entirely evident to a Marylander who knows anything of the public life of his State, that the Legislature was taking the gambler's chance—that they would pass the law and, if its validity was assailed, would use every effort to prevent the real question from being determined. The greater part of the brief for the appellants in error shows this; this very point we are now arguing shows it most strongly.

The argument simply means this—true, we are violating the Constitution of the United States; true, we suspected this when the law was passed—but we won't let any Court decide it because we have so drawn the law that if our wrongdoing, our violation of the Constitution is alleged, we will show that the registers against whom you bring the action for damages had no official standing. We will effectively nullify the Fifteenth Amendment, because you can not invent a remedy for the wrong.

Is this position sound? We think that the suggestion already made show that it is not. But further light is cast upon it by looking at the (a) election machinery, and (b) the qualifications of voters applicable to Annapolis prior to the Act of 1908 and the changes made by the Act.

We beg leave to call attention to the great difference between (a) election machinery and (b) qualifications of voters.

As to the election machinery prior to the Act of 1908, it is necessary only to state the main points. After a long struggle a great election law was passed in Maryland, being the Act of 1896, Chapter 202. It is obviously inconvenient to reprint in this Brief its more than 150 sections, many of which have no relevancy to this discussion.

But, in substance, there was a Board of Supervisors of Elections for each County; the board in each year when there was a November election appointed two judges of elections, one from each of the leading parties in the State, upon the 1st of July, and two more before September 15th. The two judges appointed before July 1 were to be also registers of voters. An entirely new registration was provided for and thereafter provision was made for revisions.

As to the City of Annapolis it was provided (section 38):

"In the year 1897, however, and every second year thereafter, the books of registration for the City of Annapolis shall be opened by the several boards of registry for the wards and precincts thereof on the second Monday and the following Tuesday of those years for the purpose of registering new voters and for the correction of said books of registration prior to the biennial municipal election in said city in the month of July, and of those sittings of the said boards of registry ten days' previous public notice shall be given by the Board of Supervisors of Anne Arundel County directed by section 13."

This means simply that prior to the Act of 1908 there was a board of registry composed of two persons, each a member of the two leading political parties of the State—a bi-partisan board—who, after the general registration in 1896, were to revise the registration lists biennially from 1897.

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As to the qualifications of voters the law gave the right to vote to every male citizen of 21 years of age or over, and under this, as has been shown by the evidence and by the allegations of the declaration, so far as the demurrer is concerned, negroes and whites were treated equally since 1870.

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The Act of 1908 makes a change in both of these things—it changes the election machinery and also the qualifications of voters. The change in the qualification of voters is in section 4. Under its several provisions, though the negro is not mentioned, the sole object is to let all white men vote and exclude from the franchise nearly all negroes.

But the change in the election machinery, which is quite a different matter, is found chiefly in section 1. By this section the Supervisors of Elections during the month of May, 1909, and every two years thereafter in the same month, appoints three registers for the City of Annapolis for each ward. Prior to 1908, two bi-partisan judges of election were appointed before July 1, who were also to serve as registers; after 1908, three registers, one from each of the leading parties, thus giving the leading party a partisan majority, were to be appointed in May.

Why is this section not valid? What ground have the appellants in error to stand on when they say that this section

would not have been passed if the Legislature thought that the section as to the qualification of voters should be declared void by the Courts? The two things are different and can stand or fall alone. It is of advantage to a political party to have its own registers of voters in control; it is of advantage to them to break down a bi-partisan board equally divided, where there is an absolute veto on party wrong. This provision as to the appointment of registers is in a section by itself. It can stand, though all the rest of the Act fall. And if it stands and the scheme to disfranchise the negro through the other section falls, then this right of action lies. The two things are distinctly severable.

Just consider for a moment. Did the Legislature intend that there should be no valid election in Annapolis? The law provides that the books of registration of these new registers, who superseded the old, should be the only books of registration for municipal purposes in that city. If the whole law could be void then these, the only books of registration, would be worthless; no one could legally vote in the old registration because that was intended to be superseded.

All of which clearly shows that the Legislature intended at all events to have valid registers of voters, and when the registration list was made up, excluding the negroes, it would take chances in fighting the right of the negroes to get on the list.

This is the precise point taken in the declaration, and we respectfully submit is the only sound view.

### VIII.

We do not deem it necessary to answer that part of the brief which attempts to show that the Fifteenth Amendment was not intended to cover State elections, and that if it did the Amendment would be beyond the amending power pro-

scribed in the Constitution. The whole argument is based on the fallacy of confounding privileges and immunities with rights. Both the Fourteenth and Fifteenth Amendments give the right not to be discriminated against by State action. The argument of the appellants in error if logically carried out would nullify not only the Fifteenth Amendment, but the greater part of the Fourteenth Amendment as well.

The suggestion in the brief on these points is opposed by an unbroken current of Federal and State authority.

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